

October 11, 2022

VIA EMAIL

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Lee Perselay
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Re: Complaint under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d

Dear Ms. Pino, Mr. Perselay and Ms. Stoneman:

Pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the implementing regulations of the United States Department of Health and Human Services (“HHS”) and the United States Department of Labor (“DOL”), Chinese Staff and Workers’ Association (“CSWA”), National Mobilization Against Sweatshops (“NMASS”) and Flushing Workers’ Center (“FWC”)(together, the “Complainants”) submit this complaint against the New York State Department of Health (“NYSDOH”) and New York State Department of Labor (“NYSDOL”) for various policies and practices relating to “live-in” 24-hour home care services that are discriminatory and have caused disproportionate adverse impacts on home care aides and Medicaid consumers of home care services on the basis of their race and national origin.

As detailed below, home care aides are forced to work under conditions that subject them to unconscionable levels of wage theft and make them extremely vulnerable to occupational injuries that often lead to permanent disability. NYSDOH’s failure to properly oversee and enforce New York State’s Medicaid regulations results in home care aides being unlawfully assigned to work multiple, consecutive “live-in” 24-hour shifts during which they receive only minimal opportunities to rest because they are providing assistance to consumers who require constant attention throughout the day and night. For consumers, these failures result in unlawful care authorizations that deprive consumers of the services to which they are entitled and force those with the highest

needs to receive assistance from aides who are weakened by exhaustion and injury. Wage theft then worsens the conditions for both work and care. Enabled by NYSDOH and NYSDOL, the agencies and managed long-term care plans (“MLTCs”) that employ “live-in” 24-hour aides violate state and federal laws by paying these aides only 13-hours per shift – at rates that are far below those required by statute and fail to include mandatory overtime premiums. Aides seeking payment for uncompensated hours are directed by their employers to simply “work less,” jeopardizing the safety of those they serve, while the claims they file at NYSDOL are deliberately delayed. Against this backdrop, NYSDOL continues to push unlawful regulatory changes to further exclude “live-in” aides from the full protection of New York’s Minimum Wage Act.

These serious harms are experienced disproportionately by members of protected classes. This is because home care aides and highest-needs Medicaid consumers are disproportionately people of color and foreign-born. Eighty-one percent (81%) of all home care aides in New York State are non-white and sixty-seven percent (67%) are naturalized citizens of the U.S. or non-citizens.¹ By comparison, seventy-three percent (73%) of residential care home workers are U.S. citizens by birth and forty-five percent (45%) are white.² Statistics regarding home care consumers are no less stark: seventy-seven percent (77%) of consumers enrolled in an MLTC are non-white.³

Complainants request the following relief with respect to NYSDOH: (a) NYSDOH revise the Uniform Assessment System (“UAS-NY”) to adequately and accurately assess the ability of aides to obtain five hours daily of continuous, uninterrupted sleep during an eight-hour period of sleep so that consumers are correctly authorized for split-shift services pursuant to 18 N.Y.C.R.R. §§ 505.14, 505.28; (b) NYSDOH direct contracted MLTCs and MCOs to reassess all home care consumers authorized for “live-in” 24-hour services and immediately reauthorize those who qualify for split-shift services; audit all reassessments and reauthorizations and make public the results of such audit; and exclude MLTCs and MCOs from providing Medicaid services if they are found to under-authorize consumers who are entitled split-shift services; (c) NYSDOH audit all authorization changes since January 1, 2022 resulting in reduced home care hours; make public the results of such audit; and exclude all MLTCs and MCOs from providing Medicaid services if they are found to under-authorize consumers who are entitled to split-shift services; and (d) NYSDOH initiate public rulemaking procedures to define “adequate sleeping accommodations” for personal care aides as required by 18 N.Y.C.R.R. § 505.14 for the lawful authorization of split-shift services.

Complainants request the following relief with respect to NYSDOL: (a) NYSDOL immediately rescind and nullify all unlawful amendments to the Miscellaneous Industries and Occupations Minimum Wage Order related to “live-in” home care services promulgated between October 2017 and the present date; (b) NYSDOL issue Orders to Comply within three months for

¹ See PHI, “Workforce Data Center, Race and Ethnicity, New York,” <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Race+and+Ethnicity> (last accessed Oct. 3, 2022); “Workforce Data Center, Citizenship, New York,” <https://www.phinational.org/policy-research/workforce-data-center/#states=36&var=Citizenship> (last accessed Oct. 3, 2022).

² *Id.*

³ Exhibit (“Ex.”) 1, “MLTC Enrollment by Race,” <https://health.data.ny.gov/Health/MLTC-Enrollment-by-Race/pqn2-pnmf> at 2 (last accessed Oct. 3, 2022).

all claims filed by home care aides on or before September 2022 for the full amount of unpaid wages, overtime and spread of hours pay, including the full amount of statutory liquidated damages, against LHCSA, MCO and MLTC employers; and (c) NYSDOL convene a Wage Board for the purpose of developing a Home Care Industry Minimum Wage Order.

Complainants request the following relief with respect to NYSDOH and NYSDOL: (a) NYSDOH and NYSDOL audit all MLTCs, CHHAs and LHCSAs to ascertain compliance with state and federal labor laws and New York Home Care Worker Wage Parity Act, make public the results of such audit and order the forfeiture of contracts with and payments already made to those found to violate the law and initiate criminal penalties as set forth in N.Y. Pub. Health Law § 3614-c(7-a); and (b) NYSDOH issue official guidance to all MLTCs, CHHAs and LHCSAs directing that overtime premiums be calculated using the Wage Parity minimum compensation rate as the regular rate.

Complainants also request that the investigations of NYSDOH and NYSDOL be consolidated. Although NYSDOH is a funding recipient of HHS and NYSDOL is a funding recipient of DOL, the violations raised by Complainants are so interlinked across the programmatic activities of both HHS and DOL and impact both consumers and workers that effective remedial action requires coordination between the two federal agencies. Complainants further request that the Civil Rights Division of the Department of Justice play an active role in ensuring consistent and comprehensive investigative and enforcement actions.

I. COMPLAINANTS

CSWA was founded in 1979 as the first contemporary workers' center to bring together workers across trades. With over 1,300 members led primarily by women workers, CSWA fights for change in the workplace as well as in the community-at-large. CSWA's work connects individual workers' daily struggles for survival into a collective force to address the multiple barriers of race, gender, age, and immigration status that create and compound worker exploitation.

NMASS is a multi-trade, multi-ethnic workers' center where working people unite across industry, race, nationality and gender to fight for the changes needed in their workplaces, communities and lives. Founded in 1996 by young working people, NMASS has a workers' center in the Lower East Side of Manhattan as well as members and supporters all over the country. Central to NMASS's mission is the right of working people to control their work, health, time and lives to end the "sweatshop system," which sweats wealth out of workers using downsizing, subcontracting, outsourcing, and temporary and contingent labor; forces workers into longer and longer hours, leading to injuries and occupational diseases; and steals away workers' freedom and lives, turning workers into disposable work machines.

FWC was founded in 2014 by immigrant and young workers to unite workers to fight for better conditions at their workplaces, homes and communities. FWC is a membership organization open to workers of all trades, ethnicities and backgrounds.

CSWA, NMASS and FWC are sponsors of the Ain't I A Woman?! campaign ("AIW"). Since 2014, AIW has been supporting "live-in" 24-hour home care aides in their fight to end the various injustices surrounding "live-in" 24-hour services. To that end, AIW has helped organize direct actions protesting the policies and practices of individual employers, 1199SEIU, and both

NYSDOH and NYSDOL. In 2017 and 2018, CSWA and NMASS, filed two legal actions on behalf of its members contesting the legality of emergency regulations promulgated by NYSDOL excluding “live-in” 24-hour home care aides from the right to receive pay for all hours worked. Beginning in approximately December 2018, CSWA, NMASS and FWC have also assisted hundreds of aides in filing wage theft claims with NYSDOL.

II. JURISDICTION

A. Program or Activity Receiving Federal Financial Assistance

Title VI prohibits programs receiving federal financial assistance from engaging in acts that subject individuals to discrimination on the basis of race, color or national origin. 42 U.S.C. § 2000d. The term “program” is defined by the regulations implementing Title VI to include all operations of any State department or agency. 45 C.F.R. § 80.13(g)(1)(i); 29 C.F.R. § 31.2(g)(1)(i). NYSDOH is the single agency for the State of New York with responsibility to supervise New York’s administration of Medicaid benefits. N.Y. Pub. Health § 201(1)(v); N.Y. Soc. Serv. Law § 363-a(1). NYSDOL, led by the Commissioner of Labor, is the sole department of the State of New York with power to enforce the provisions of the New York Labor Law, including the law’s minimum wage, spread of hours, overtime and notice requirements. N.Y. Lab. Law §§ 10, 21, 198, 663; 12 N.Y.C.R.R. §§ 141-1.4, 142-2.2, 142-3.2, 143-2.2, 146-1.4. All grants made by HHS and DOL are considered federal financial assistance that bring a program’s operations under the ambit of Title VI. 42 C.F.R. § 80.13(f)(1); 29 C.F.R. § 31.2(e)(1). Since 2015, NYSDOH has received more than \$358 billion in grants from the Centers for Medicare and Medicaid Services (“CMS”), a sub-agency of HHS.⁴ Since 2015, NYSDOL has received more than \$5.89 billion in grants from DOL.⁵ Therefore, NYSDOH and NYSDOL are both subject to Title VI’s prohibition against discrimination.

B. Timeliness

Pursuant to the implementing regulations of HHS and DOL, administrative complaints regarding violations of Title VI must be filed within 180 days from the date of the alleged discrimination, unless the lookback period is extended by the Department. 45 C.F.R. § 80.7(b); 29 C.F.R. § 31.7(b). Here, Complainants have identified multiple discriminatory acts that fall within the 180-day statute of limitations. As related to NYSDOH, these discriminatory acts include: (i) the partial implementation on December 1, 2022 of amended personal care regulations and (ii) the distribution of \$1.4 billion of enhanced Federal Medical Assistance Percentage (FMAP) funding between January 1, 2022 and March 31, 2023 to home care agencies, including agencies who are non-compliant with the New York Home Care Workers Wage Parity Act (“WPA”), N.Y. Pub. Health Law § 3614-c. As related to the NYSDOL, these discriminatory acts include: (i) the agency’s refusal to process and investigate wage theft claims filed by home care aides, reiterated as recently as September 13, 2022 and (ii) the on-going publication of regulations concerning payment of wages for “live-in” home care aides that were struck down as unlawful. And as relates to both NYSDOH

⁴ USAspending, Recipient – NYSDOH, https://files.usaspending.gov/generated_downloads/PrimeAwardSummariesAndSubawards_2022-08-23_H16M59S54449741.zip (last accessed Oct. 3, 2022).

⁵ USAspending, Recipient – NYSDOL, https://files.usaspending.gov/generated_downloads/PrimeTransactionsAndSubawards_2022-08-23_H16M58S08176570.zip (last accessed Oct. 3, 2022).

and NYSDOL, together these state agencies share enforcement oversight of new compliance requirements of the WPA that went into effect June 1, 2022.

C. Not “Employment Practices” Unenforceable Under Title VI

Importantly, none of the discriminatory acts raised by Complainants concern employment practices excluded from the protections of Title VI. *See* 42 U.S.C. § 2000d-3; 45 C.F.R. § 80.3(c); 29 C.F.R. § 31.3(c). Complainants allege that NYSDOH and NYSDOL have implemented and enforced systems that adversely impact home care aides on the basis of their race and national origin. However, Complainants do not allege that the employers of home care aides are themselves engaged in unlawful discrimination. On the contrary, Complainants believe that home care aide employers apply the discriminatory policies of NYSDOH and NYSDOL universally, without distinction across their workforces. As such, Complainants do not believe a cause of action exists under Title VII of the Civil Rights Act or that an enforcement action filed with the EEOC could address the harms home care aides disproportionately suffer as a result of NYSDOH and NYSDOL’s discriminatory acts. Instead, Complainants believe that an administrative enforcement action pursuant to Title VI is one of the few mechanisms available to effectively end New York’s yearslong discrimination against home care aides and the highest-needs consumers of home health services.

Moreover, 24-hour home care services in New York can only be remediated through a holistic investigation and enforcement action that addresses the harms related to both workers and consumers. This is because the same discriminatory acts that adversely impact home care aides also adversely impact Medicaid consumers. In particular, NYSDOH’s refusal to create and/or mandate the use of an assessment tool that accurately captures information about a consumer’s sleep habits and sleeping accommodations harms those consumers with the highest level of need, who are systematically under-authorized for care services, at the same time that it harms aides, who are forced to work “live-in” 24-hour shifts. Similarly, NYSDOH and NYSDOL’s failure to enforce wage protection statutes for home care aides leads to a degeneration of standards, including a degeneration in the care that consumers require to stay safe and healthy. Widespread wage theft, especially related to abusive 24-hour shifts, also contributes to a workforce shortage that is reaching crisis levels in parts of New York and puts many older and disabled consumers at serious risk of institutionalization.⁶

III.BACKGROUND

A. Two Types of 24-Hour Home Care Services

In order to receive long-term, community-based home care services, Medicaid consumers are required to enroll in managed long-term care (“MLTC”) plans.⁷ The MLTCs then allot the

⁶*See, e.g., Addressing the Crisis in the Long-Term Care Workforce: Report and Findings of the Senate Committed on Aging, Health and Labor* (July 27, 2021), https://www.nysenate.gov/sites/default/files/article/attachment/long-term_care_workforce_hearing_report_2021.pdf (last accessed Sept. 30, 2022); *The High Cost of Low Wages: A Report By the Consumer Directed Personal Assistance Association of New York State (CDPAANY)*, <https://cdpaanys.org/wp-content/uploads/2021/11/Final-High-Cost-of-Low-Wages-Report.pdf>. (last accessed Sept. 30, 2022).

⁷ NYSDOH, “Managed Long Term Care: Frequently Asked Questions,” https://www.health.ny.gov/health_care/medicaid/redesign/mltc_faq2_final.htm. Long-term defined as more than 120 days (last accessed Sept. 30, 2022).

number of authorized home care hours based on assessments performed using State-mandated evaluation tools. *See* 18 N.Y.C.R.R. §§ 505.14 (regarding personal care services), 505.28 (regarding the consumer directed personal assistance program (“CDPAP”).

Consumers with the highest level of need may be authorized for 24-hour home care services in the form of either “live-in” 24-hour services or continuous services. Continuous services, also known as split-shift services, are defined as:

the provision of uninterrupted care, by more than one [aide], for more than 16 hours in a calendar day for a patient who, because of the patient’s medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour [aide] would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight hour period of sleep.

Id. at §§ 505.14(a)(2), 505.28(b)(6). “Live-in” 24-hour services are defined as “the provision of care by one [aide] for a patient...whose need for assistance is sufficiently infrequent that a “live-in” 24-hour [aide] would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide’s eight hour period of sleep.” *Id.* at §§ 505.14(a)(4), 505.26(b)(11). “Live-in” 24-hour services may not be authorized for personal care services if the consumer’s home does not have “adequate sleeping accommodations for a personal care services aide.” *Id.* at § 505.14(b)(2)(iii)(c). Instead, under those circumstances, continuous services must be authorized. *Id.* However, the regulations are silent on what types of sleeping accommodations might be considered “adequate.” As a result, aides working “live-in” shifts have reported very poor sleeping accommodations, including a space at the foot of the consumer’s bed, a pull-out cot in a studio apartment shared with the consumer and the consumer’s three adult children, a bed directly adjacent to the consumer’s bed and a reclining chair.⁸

Despite these regulations, fundamental obstacles impeding the proper delivery of 24-hour home care services have existed since at least 2013 when New York embarked on a redesign of its Medicaid services. Since then, New York has mandated that all individuals seeking home care services have their needs assessed using the Uniform Assessment System (UAS-NY), a tool created by NYSDOH that includes a Community Health Assessment (CHA).⁹ However, the CHA portion of the UAS-NY does not capture any information about the ability of aides to obtain uninterrupted sleep or the availability and adequacy of sleeping accommodations. As a result, consumers who should receive continuous (split-shift) care are systematically under-authorized for “live-in” 24-hour services and aides are forced to work shifts that do not adequately provide for their need to sleep.

⁸ *See Feng v. Elderplan*, No. 20-CV-2049 (GHW) (JLC) (SDNY), Dkt. #49 (Amended Complaint) at ¶¶ 59, 64, 68, 74, 81, 86, 93, 97, 103, 107, 113.

⁹ NYSDOH, “UAS-NY Statewide Implementation Plan Update (March 12, 2013),” https://www.health.ny.gov/health_care/medicaid/redesign/uniform_assessment_system/archives/2013-03-12_statewide_implement_plan.htm (last accessed Sept. 19, 2022); NYSDOH, “UAS-NY Reporting,” https://www.health.ny.gov/health_care/medicaid/redesign/uniform_assessment_system/archives/uasny_reporting02.htm.

B. Evolution of the “13-Hour Rule”

Beginning in 1972, when domestic workers were finally extended some protections of the New York Labor Law, NYSDOL advised employers of home care aides that they could lawfully discharge their obligations under the Minimum Wage Act by paying “live-in” home care aides for only 13 hours per shift so long as aides were also provided with eight hours of sleep (five of which had to be uninterrupted) and three hours of meal breaks.¹⁰ Known as the “13-Hour Rule,” NYSDOL’s informal guidance over the years clearly stated that this pay structure was permitted only when the qualifying conditions around sleep and meal breaks were fulfilled. However, in practice NYSDOL never inquired into sleep or meal breaks when determining wage claims by aides, rendering the qualification meaningless.

For example, in May, 2014, NYSDOL entered into a stipulation of settlement with Chinese-American Planning Council Home Attendant Program (“CPCHAP”), concluding an investigation of CPCHAP’s wage practices for all of its current and former employees from August 25, 2007 to December 27, 2013.¹¹ During that period, Lai Yee Chan worked between three and five consecutive 24-hour shifts per week caring for a consumer in his eighties who had dementia, prostate problems and required the assistance of breathing equipment.¹² Ms. Chan did not receive five hours of continuous sleep because, at least five times per night, Ms. Chan was called upon to assist the consumer with toileting, including changing his diaper and helping him to use the bathroom.¹³ Ms. Chan’s consumer also had difficulty swallowing, and would frequently call out to her at night in panic asking for help.¹⁴ Ms. Chan never received three, duty-free meal breaks per shift. Like all of her colleagues who worked “live-in” shifts, Ms. Chan was paid wages for only the first 12 hours of work plus a per diem of \$16.95.¹⁵ She received no overtime or “spread of hours” pay.¹⁶ Despite these working conditions, NYSDOL determined that Ms. Chan was only owed \$362.95 for the entire six-year period.¹⁷

As part of the same investigation, NYSDOL determined that Hui Ling Chen was owed only \$629.62 even though, during the covered period, Ms. Chen worked two “live-in” 24-hour shifts caring for one consumer and two “live-in” 24-hour shifts caring for a second consumer.¹⁸ Both

¹⁰ See, e.g., Ex. 2, NYSDOL Request for Opinion (“RO”) Letter, dated March 11, 2010, <https://statistics.labor.ny.gov/legal/counsel/pdf/Other/RO-09-0169%20-%20Live-In%20Companions.pdf> (last accessed Oct. 3, 2022); Ex. 3, NYSDOL RO Letter, dated July 14, 1995; Ex. 4, NYSDOL Record, *Matter of Chinese Staff & Workers’ Assn v. Commissioner of Labor*.

¹¹ Ex. 5, Stipulation of Settlement.

¹² See *Chan v. Chinese-American Planning Council Home Attendant Program, Inc.*, Index No. 65037/2015 (Sup. Ct. N.Y.), NYSCEF Doc. No. 1 (Class Action Complaint) (“*Chan Complaint*”) at ¶ 33; Ex. 6, July 30, 2019 Letter at 61.

¹³ Ex. 6, July 30, 2019 Letter at 61.

¹⁴ *Id.*

¹⁵ *Chan Complaint* at ¶ 33; Ex. 7, Collective Bargaining Agreement between 1199SEIU United Healthcare Workers East and Chinese-American Planning Council Home Attendant Program, Inc. (“2012 1199-CPC CBA”) at 72.

¹⁶ *Chan Complaint* at ¶ 34.

¹⁷ Ex. 8, Recapitulation Sheet at 77.

¹⁸ *Id.* at 76; *Chan Complaint* at ¶ 36; Ex. 6, July 30, 2019 Letter at 61.

consumers were paralyzed and had dementia.¹⁹ Both consumers had care plans that required Ms. Chen to turn and reposition their bodies every two hours, including throughout the night.²⁰ Ms. Chen also changed her patients' diapers between three and five times per night.²¹ Ms. Chen never received three, duty-free meal breaks per shift.²²

Xue Rou Xie also worked for CPCHAP during NYSDOL's investigatory period.²³ Ms. Xie worked three "live-in" 24-hour shifts per week caring for a consumer who had dementia and became completely paralyzed in 2012, after which the consumer required turning, repositioning and diaper changes every two hours, including throughout the night.²⁴ Ms. Xie never received five continuous hours of uninterrupted sleep or three, duty-free hours for meal breaks.²⁵ Nevertheless, NYSDOL found her to be owed only \$447.59 in unpaid wages, overtime and spread of hours pay.²⁶

NYSDOL's policy of enforcing up to a maximum of 13 hours became so widely relied upon that paying for only 13 hours became the industry standard: State entities, including state-contracted MLTCs, reimbursed licensed home care services agencies ("LHCSAs") for "live-in" shifts at per diem rates that covered only 13 hours;²⁷ and agency-employers, using a wage scale determined by 1199SEIU, the largest health care union in the State representing more than 110,000 home care workers, paid aides working "live-in" shifts for thirteen hours only.²⁸ Sleep time and meal breaks were not considered at all.

1. Conflict Between the 13-Hour Rule and the Minimum Wage Order

Between 2011 and 2016, a series of cases within New York's Supreme Court system put into question the validity of the 13-Hour Rule. In both *Andryeyeva v. New York Health Care* and *Chan v. Chinese-American Planning Council, Inc.*, home care aide plaintiffs filed class-action complaints seeking compensation for all 24-hours of their "live-in" shifts in accordance with the Miscellaneous Industries and Occupations Minimum Wage Order ("Wage Order"), the set of regulations published by NYSDOL implementing the Minimum Wage Act and covering home care aides.²⁹ In relevant part, the Wage Order provided that:

¹⁹ Ex. 6, July 30, 2019 Letter at 61.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Chan* Complaint at ¶ 39; Ex. 8, Recapitulation Sheet at 76; Ex. 6, July 30, 2019 Letter at 65.

²⁴ Ex. 6, July 30, 2019 Letter at 6.

²⁵ *Id.*

²⁶ Ex. 8, Recapitulation Sheet at 76.

²⁷ NYSDOH, "Personal Care Rates," https://www.health.ny.gov/facilities/long_term_care/reimbursement/pcr/ (last accessed Sept. 30, 2022); Ex. 9, CPC Home Care Infographic, "Advocating for 12-Hour Split Shift Cases in Home Care".

²⁸ Ex. 7, 2012 1199-CPC CBA at 72; *Andryeyeva v. New York Health Care, Inc.*, 994 N.Y.S.2d 278, 289 (Sup. Ct. 2014).

²⁹ *Andryeyeva v. New York Health Care, Inc.*, Index No. 14309/2011 (Sup. Ct. N.Y.), NYSCEF Doc. No. 1 (Summons + Complaint); *Chan* Complaint.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer. . . . However, a residential employee – one who lives on the premises of the employer – shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.

12 N.Y.C.R.R. §§ 142-2.1(b) (covering for-profit entities), 142-3.1 (covering non-profit entities).³⁰ Relying on the plain meaning of the Minimum Wage Order, the plaintiffs argued that, as agency-employed home care aides, they were not residential employees³¹. Therefore, the regulations required that they receive payment for all hours that they worked or were on call. Plaintiffs further argued that, to the extent the 13-Hour Rule conflicted with the Minimum Wage Order, the 13-Hour Rule should not be followed because it was an irrational and unreasonable interpretation of the Wage Order.

The courts agreed. *Andryeyeva v. New York Health Care, Inc.*, 994 N.Y.S.2d 278, 285 (Sup. Ct. 2014); *Chan v. Chinese-American Planning Council Home Attendant Program Inc.*, 21 N.Y.S.3d 814, 827 (Sup. Ct. 2015). In certifying the *Andryeyeva* class and denying CPCHAP's motion to dismiss, the courts concluded that they were not required to defer to NYSDOL's interpretation of the Wage Order creating the 13-Hour Rule because NYSDOL's construction was "irrational or unreasonable" and in "conflict with the plain meaning of the promulgated language." *Andryeyeva* at 287; *Chan* at 827. As such, the plaintiffs were entitled to compensation for all of the hours that they worked or were on call. *Id.*

New York Health Care subsequently appealed Judge Carolyn Demarest's *Andryeyeva* opinion. However, no appeal flowed from Judge Carol Edmead's *Chan* decision: less than three months later, 1199SEIU signed a memorandum of agreement with CPCHAP (and, in subsequent weeks, with all forty-two of the agencies with whom it had collective bargaining agreements) requiring that all aide grievances related to the payment of wages be subject to mandatory arbitration, effectively ending the aides' ability to proceed with court litigation.³²

In 2016, Judge Edmead was presented with another class of home care aide plaintiffs claiming payment for all 24-hours of each "live-in" shift in accordance with the Minimum Wage Order.³³ Referring back to her decision in the *Chan* case, Judge Edmead denied defendant Human Care's motion to dismiss, holding that a plain reading of the Minimum Wage Order required payment for all hours worked or on call, contrary to NYSDOL's guidance regarding the 13-Hour Rule. *Tokhtaman v. Human Care, LLC*, No. 151268/2016, 2016 WL 4439990 at *4-5 (Sup. Ct. Aug.

³⁰ Ex.10, Minimum Wage Order for Miscellaneous Industries and Occupations, eff. Dec. 31, 2016.

³¹ This argument was also supported by long-standing interpretation of NYSDOL. *See* Ex. 11, NYSDOL Inter-Office Memorandum, Feb. 1, 1984 at 88.

³² Ex. 12, Memorandum of Agreement, Dec., 2015 at 100-101.

³³ *Tokhtaman v. Human Care, LLC*, Index No. 151268/2016 (Sup. Ct. N.Y.), NYSCEF Doc. No. 1 (Summons + Complaint).

22, 2016). On April 11, 2017, Judge Edmead’s decision was affirmed by the Appellate Division, First Department. 149 A.D.3d 476, 476-477 (App. Div. 1st Dep’t 2017) (“We find that the DOL opinion conflicts with 12 NYCRR 142-2.1(b) insofar as the opinion fails to distinguish between ‘residential’ and ‘nonresidential’ employees, and should thus not be followed in this respect.”) (citing *Chan and Andryeyeva*). In response to the First Department’s decision, NYSDOH issued a statement that NYSDOH and NYSDOL would “continue to evaluate whether action may be needed to prevent unnecessary disruption to home care services in New York State” and explicitly directed that that “[l]ive-in cases **should not** be converted to 24-hour continuous split-shift care unless the individual meets the criteria for this higher level of care.”³⁴

On September 13, 2017, the Appellate Division, Second Department issued its ruling on the *Andryeyeva* appeal:

We agree with our colleagues in the Appellate Division, First Department, that the DOL’s interpretation is neither rational nor reasonable, because it conflicts with the plain language of the Wage Order. The plaintiffs were required to be at the clients’ residences and were also required to perform services there if called upon to do so. To interpret that regulation to mean that the plaintiffs were not, during those nighttime hours, “required to be available for work” simply because it turned out that they were not called upon to perform services is contrary to the plain meaning of “available.” In short, to the extent that the members of the proposed class were not “residential” employees who “live[d] on the premises of the employer,” they were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals.

153 A.D.3d 1216, 1218 (App. Div. 2nd Dep’t 2017) (citing *Tokhtaman*). That same day, the Second Department issued a substantively identical ruling on a second case. *Moreno v. Future Care Health Services, Inc.*, 153 A.D.3d 1254, 1255 (App. Div. 2nd Dep’t 2017) (“To the extent that the DOL’s opinion letter fails to distinguish between ‘residential’ and nonresidential employees, it conflicts with the plain meaning of 12 NYCRR 142-2.1(b) and should not be followed.”) (citing *Andryeyeva* and *Tokhtaman*).

2. NYSDOL Emergency Regulations

On October 6, 2017, NYSDOL issued an emergency regulation, appending to 12 N.Y.C.R.R. §§ 142-2.1(b) and 142-3.1(b) the following language:

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.³⁵

³⁴ Ex. 4, NYSDOL Record at 54 (emphasis original).

³⁵ New York State Department of State, “New York State Register, Oct. 25, 2017,” <https://dos.ny.gov/system/files/documents/2019/11/102517.pdf> at 6 (last accessed Oct. 7, 2022).

In its regulatory impact statement, NYSDOL described the emergency rule change as:

[N]ecessary to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the fact of recent decisions by the State Appellate Divisions for the First and Second Departments that treat meal periods and sleep time by home care aides as hours worked for purposes of state (but not federal) minimum wage.³⁶

On December 8, 2017, Complainants CSWA and NMASS filed a petition at the New York State Industrial Board of Appeals (“IBA”) asking the IBA to set aside the emergency Wage Order because the regulations violated the Minimum Wage Act, were outside the scope of the Labor Commissioner’s powers and usurped legislative power in violation of separation of powers principles.³⁷ Citing to statistics indicating high levels of poverty among home care aides, Complainants argued that “[b]y taking away the right of home care aides to be paid for all their hours worked, the Emergency Wage Order further depresses the already bleak financial picture of many of New York’s home care workers” in direct contravention of the Minimum Wage Act’s purpose to eliminate the employment of persons at “wages insufficient to provide adequate maintenance for themselves and their families.”³⁸

Over the objections of both Complainants and NYSDOL, on January 23, 2018 the IBA declined to review the validity of the emergency regulations, claiming that NYSDOL’s method of promulgation put the Wage Order amendments outside of its jurisdiction. Complainants, along with five individual home care aide members, subsequently filed an Article 78 petition at the New York Supreme Court asking the Court to strike down the October 6 emergency regulations as well as two intervening rulemakings filed by NYSDOL to renew the emergency Wage Order.³⁹

In response to increasing public scrutiny, on July 11, 2018, NYSDOL held a public hearing regarding the emergency regulations in which it heard testimony from LHCSAs, home care aides, advocacy organizations and enforcement agencies.⁴⁰ Many testified on the insufficiency of funds flowing from the State and the pervasive and overwhelming violations of the 13-Hour Rule suffered by aides.⁴¹

On September 25, 2018, the Court declared the emergency regulations “null, void and invalid,” and enjoined NYSDOL “from implementing or enforcing the Emergency Rules.” *Matter of*

³⁶ *Id.* at 5.

³⁷ Ex. 13, *Matter of Chinese Staff & Workers’ Assn v. Commissioner of Labor*, Petition for Review at ¶ 3.

³⁸ *Id.* at ¶¶ 7-8.

³⁹ *Matter of Chinese Staff & Workers’ Assn v. Reardon*, No. 450789/2018 (Sup. Ct. N.Y.), NYSCEF Doc. No. 1, Verified Petition and Complaint (May 4, 2018).

⁴⁰ Ex. 14, Sleep and Meal Time Regulations Hearing, Jul. 11, 2018.

⁴¹ *Id.*; also New York City Department of Consumer Affairs, Written Comments, July 10, 2018, <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Advocacy-NYSDOL-24-Hour-Rule-071018.pdf>.

Chinese Staff & Workers' Assn v. Reardon, No. 450789/2018, 2018 WL 4616294 at * 5 (Sup. Ct. Sept. 25, 2018). Finding that the record did not justify the use of SAPA's emergency rulemaking procedures, the Court noted that NYSDOL was aware of problems with the 13-Hour Rule "when litigation was commenced in 2011 challenging their 2010 opinion letter. Yet, [NYSDOL] chose to wait until after the Appellate Division decisions were rendered to promulgate the 'emergency' rulemakings rather than pursue the normal rule making procedure." *Id.* On November 13, 2018, the Court issued a second order nullifying emergency regulations promulgated by NYSDOL on July 30, 2018 and September 20, 2018 and directing "that any additional Emergency Rulemakings promulgated by [NYSDOL] that are otherwise identical, but for the date of issuance, to the Emergency Rulemakings covered by the Court's September 2[5], 2018 Order and this Order shall be invalid."⁴²

3. The Court of Appeals Decision

On February 12, 2019, the judges of the New York Court of Appeals heard oral argument in the *Andryeyeva* and *Moreno* cases. Although not a party to either of the cases, NYSDOL appeared as *amicus curiae* and argued that the 13-Hour Rule should be left undisturbed because of "the length and vintage of this history."⁴³ Counsel for NYSDOL also stated to the Court:

[O]ne thing that I do want to emphasize is that the Department treats as seriously the exclusion parts of this...the...the narrow circumstance of this rule as it does the exclusion. I mean, the...there are many situations where employers fail to satisfy the prerequisites for excluding this time. And one thing I do want to clarify, Judge Rivera, is that if the employer does not satisfy these prerequisites, it's not just the time working that the employee is compensated, but actually the entire twenty-four-hour period. You get interrupted for meal times, you get that hour of compensation. You don't get the five hours of sleep, you get paid for the full eight hours. *So it is a hair-trigger application of these provisions to protect workers from these types of abuses that the Department regularly sees.*⁴⁴

On March 26, 2019, the majority of Court of Appeals reversed the Second Department orders and held that NYSDOL's interpretation of its regulations was binding. *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152 (N.Y. 2019). Accordingly, "live-in" home care aides were only entitled to 13 hours of pay, provided their employers ensured eight hours of sleep (five of which were uninterrupted) and three hours of meal breaks. *Id.* at 182. In reaching its decision, the Court wrote:

[NYS]DOL's interpretation of the Wage Order reflects its specialized knowledge of labor law's evolving application to domestic workers and the home health care industry. It further reflects [NYS]DOL's expertise in handling labor law violations and its historical efforts to ensure that its

⁴² *Matter of Chinese Staff & Workers' Assn v. Reardon*, Index No. 450789/2018 (Sup. Ct. N.Y.), NYSCEF Doc. No. 47, Decision and Order (Nov. 13, 2018).

⁴³ Ex. 15, Transcript of Oral Argument, Feb. 12, 2019 at 155.

⁴⁴ *Id.* at 161 (emphasis added).

policies reflect the realities of the diverse industries and occupations over which it has administrative oversight.

Id. at 176. The majority continued, “[NYS]DOL has determined that it can avoid exploitation of these employees by interpreting its Wage order to mandate a substantive period for sleep and meals to directly benefit the employee.” *Id.* at 182. Of significant importance to the majority was the belief that, “[a]s [NYS]DOL confirms, failure to provide a home health care aide with the minimum sleep and meal times required under [NYS]DOL’s interpretation of the Wage Order is a ‘hair trigger’ that immediately makes the employer liable for paying every hour of the 24-hour shift, not just the actual hours worked.” *Id.* However, the majority noted that:

While we ultimately conclude that the Appellate Division failed to afford adequate deference to the [NYS]DOL’s interpretation of the Wage Order, we do not ignore plaintiffs’ and amici’s claims that a vulnerable population of workers is being mistreated. Plaintiffs’ allegations are disturbing and paint a picture of rampant and unchecked years-long exploitation... In concluding that [NYS]DOL’s interpretation of the Wage Order is rational, we express no opinion on the ultimate merits of plaintiffs’ claims. Moreover, to the extent plaintiffs’ allegations suggest current enforcement priorities and methods are inadequate, it is for [NYS]DOL and the Legislature, not this Court, to consider whether the sleep and meal time exemption is a viable methodology to ensure employer compliance with the law and proper wage payment in the case of home health care aides.

Id. at 182-183.

Critical of the harms perpetuated by NYSDOL and the majority opinion, Judge Michael Garcia wrote in a dissenting opinion:

As the majority notes, home health aides “care for some of the most vulnerable members of our society, doing work essential to the survival of their patients”. These employees are “predominantly composed of women and recent immigrants”, and compromise a workforce that is “easily exploited and vulnerable to various forms of wage abuse”. Plaintiffs’ allegations in this case are “disturbing” to say the least, and “paint a picture of rampant and unchecked years-long exploitation”. [NYS]DOL’s interpretation of the Wage Order not only enables this mistreatment of home health care aides, it directly affects their livelihood: with eleven hours of pay deducted from their earnings, home health care aides are paid an hourly rate less than the statewide minimum wage. Rather than hold [NYS]DOL accountable, the majority defers.

Id. at 197 (internal citations to majority opinion omitted).

4. The Post-2019 Period

Since the Court of Appeals decision, home care aides continue to be paid exactly as before: MLTCs continue to reimburse LHCSAs at a per diem rate that covers only 13 hours of pay for each

24-hour shift,⁴⁵ and agencies continue to pay aides for 13 hours out every 24-hour shift without any inquiry into sleep or meal breaks.⁴⁶ In an attempt to avoid liability, many agencies now require aides to sign agreements at the time they are hired stating that they have been (or will be) provided with eight hours of sleep and three hours for meal breaks and that they have been (or will be) paid if they report interrupted sleep.⁴⁷ Frequently, the content of these agreements are never explained to aides, many of whom are unable to read English.⁴⁸ These agreements also place the burden on aides to report interruptions. However, attempts to report nighttime work or interrupted sleep can result in retaliation against both workers and consumers.⁴⁹ For “live-in” 24-hour aides, even the basic right to “a day’s wages for a day’s work” remains elusive. *Andryeyeva*, 33 N.Y.3d at 197 (Garcia, J, dissenting).

C. New York Home Care Worker Wage Parity Act

Enacted in 2011, the WPA sets the minimum amount of total compensation that must be paid to home care aides in order for their employers to receive Medicaid reimbursements. N.Y. Pub. Health Law § 3614-c; *also Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 80 (2d Cir. 2015). This rate exceeds the statutory minimum wage. Currently, the Wage Parity Act requires that aides working in New York City receive an additional \$4.09 in total compensation on top of the basic minimum wage. This Wage Parity premium may be paid out in the form of cash or benefits.

MLTCs, certified home health agencies (“CHHAs”) and LHCSAs must annually certify to the Commissioner of Health that they are in compliance with the WPA. N.Y. Pub. Health Law § 3614-c(6). They are also required to “review and assess” similar statements and certifications that they must obtain from any sub-contracting agencies. Knowingly false certifications may be punishable as crimes and can result in the assessment of fines as well as the forfeiture of contracts and payments already made. *Id.* at §§ 6, 7-a.

Despite these harsh penalties, there is systemic failure to comply with the WPA’s requirements. MLTCs reimburse CHHAs and LHCSAs at a per diem rate that covers only 13 hours

⁴⁵ See, e.g., NYSDOH, “Personal Care Rates,” https://www.health.ny.gov/facilities/long_term_care/reimbursement/pcr/ (last accessed Sept. 30, 2022).

⁴⁶ See, e.g., *Feng v. Elderplan*, No. 20-CV-2049 (GHW)(JLC) (SDNY), *Sanguino v. Aides at Home, Inc.*, No. 20-cv-01255-GRB-AKT (EDNY); *Cantave v. All Metro Home Care Services of NY, Inc.*, No. 21-cv-3111 (SLC) (SDNY); *Asatryan v. 1st Aide Home Care Inc.*, No. 651084/2022 (Sup. Ct. N.Y.); *Cabrera v. All Care Home Health Services, LLC.*, 20-cv-01161-MKB-CLP (EDNY); *Yang v. American Business Institute, Corp.*, No. 713753/2020 (Sup. Ct. N.Y.).

⁴⁷ See, e.g., *Kinkead v. Human at Home, Inc.*, 330 F.R.D. 338, 351 (D. Conn. 2019); *Rodriguez v. Avondale Care Group, LLC*, 16-CV-03084 (SN), 2018 WL 1582433 at * 5-6 (S.D.N.Y. Mar. 27, 2018); Ex. 15, Personal Touch Home Care, HHA Live In Agreement, <https://www.pthomecare.com/hhaliveinagreement> (last accessed Oct. 7, 2022).

⁴⁸ *Rodriguez*, 2018 WL 1582433 at *5-6.

⁴⁹ Ex. 6, July 30, 2019 Letter at 61 (Lai Yee Chan), 62 (Su Zhen Chen), 65-66 (Xiao Huan Yu); Ex. 17, Aug. 13, 2019 Letter at 159 (Zhao E. Jiang) and 160 (You Li); Lee, *also David, The Nonprofit War on Workers*, https://assembly.state.ny.us/write/upload/member_files/040/pdfs/20220104_0100283.pdf at 92-98 (last accessed on Oct. 3, 2022).

for each 24-hour shift.⁵⁰ This structural deficiency makes it difficult for CHHAs and LHCSAs to comply with their Wage Parity obligations because they do not receive sufficient funding to pay wages for the remaining 11 compensable hours.⁵¹ And, in the consumer directed program, advocates allege that the per diem rate is not even sufficient for fiscal intermediaries to pass onto consumers the minimum amount of total compensation for even the 13 hours covered without forcing them to pay administrative costs out of their own operating budgets.

Even more pertinent to this Complaint, there is a failure to enforce. Although the WPA could lead to penalties, including the forfeiture of contracts with the State, NYSDOH does not enforce compliance with the WPA – even when directly presented with evidence of violations.⁵² According to Counsel for 1199:

The Wage Parity Law, which was passed in 2012 and was a victory for my client 1199, has been routinely violated since 2014. In 2018 or 2019, the Union investigated non-union agencies who were not paying the \$4.09, which is the supplemental portion of wages and benefits to which workers are entitled - home care workers who work on Medicaid cases. They were not paying it at all. And a list of 30 odd agencies were provided to the state to say, “Are you investigating? Are you enforcing this law?”⁵³

NYSDOH never responded.

NYSDOH has also failed to issue any implementing regulations that would help create better understandings around compliance. Instead, in non-binding guidance posted on its website, NYSDOH has created confusion around obligations to pay overtime, suggesting a pay scheme that violates the law.⁵⁴ Both the Fair Labor Standards Act and New York Labor Law require that overtime be paid at the “regular rate.” 29 U.S.C. § 206; 12 N.Y.C.R.R. §§ 142-2.2. 142-3.2. Existing

⁵⁰ See, e.g., NYSDOH, “Personal Care Rates,”

https://www.health.ny.gov/facilities/long_term_care/reimbursement/pcr/ (last accessed Sept. 30, 2022); Ex. 9, CPC Home Care Infographic.

⁵¹ *Id.*

⁵² On March 10, 2022, a settlement of a *qui tam* suit was reached between the United States, New York State, relator LHCSAs and Defendant All American Homecare Agency (“All American”) for All American’s alleged knowing presentation of false claims to MLTCs for services provided by aides who received less than the total compensation required by the Wage Parity Act. *United States v. All American Homecare Agency*, No. 17-CV-2938 (ILG) (MMH) (EDNY), Dkt. # 20 (Stipulation and Order Filed Under Seal), https://ag.ny.gov/sites/default/files/all_american_so-ordered_state_settlement.pdf (last accessed Oct. 3, 2022). Among other terms, the settlement requires All American to pay \$4 million. However, the settlement does not suggest that any of the settlement amount will go to aides for payment of unpaid total compensation owed to them. And the settlement does not address the structural problem of MLTCs reimbursing less than LCHSAs require to comply with the Act.

⁵³ ABA, “Mandatory Class Action Arbitration in the Homecare Industry: Abuse or Representation?,” https://www.americanbar.org/groups/labor_law/events_cle/webinars/mandatory-class-action-arbitration-in-the-homecare-industry/ at 53:00-53:43 (last accessed Oct. 4, 2022).

⁵⁴ See NYSDOH, “Home Care Worker Wage Parity Minimum Rate of Total Compensation,” https://www.health.ny.gov/health_care/medicaid/redesign/mrt61/2017-10-31_wv_parity_min_nyc.htm (last accessed Sept. 30, 2022).

law clarifying how the “regular rate” should be calculated dictates that the minimum total compensation rate required by the WPA (which in New York City is \$15 + \$4.09, or \$19.09) be considered the “regular rate” for overtime purposes. 12 N.Y.C.R.R. §§ 142-2.2, 142-3.2; 29 C.F.R. § 778.109. However, in its guidance, NYSDOH calculates overtime based on the minimum wage only.⁵⁵ For aides working in New York City, this method of calculation results in a difference of \$6.14 per overtime hour.

In the Fall of 2020, NYSDOL started to take a role in enforcing the WPA. However, NYSDOL does nothing to correct NYSDOH’s guidance: on NYSDOL’s Wage Parity website, it simply directs people seeking more information about total compensation and overtime to NYSDOH’s webpage.⁵⁶ NYSDOL’s website also includes a form for reporting suspected violations of the WPA.⁵⁷ However, the page requires information that is not readily accessible to aides, such as the name and contact information of parties responsible for Wage Parity compliance and details regarding the contract between the agency and MLTC, making it extremely difficult, if not impossible, for aides to report violations of a law intended to benefit them.

D. 1199SEIU Arbitration

Immediately following the Court’s denial of CPCHAP’s motion to dismiss in 2015, 1199SEIU (“1199”) signed a memorandum of agreement (“MOA”) with all of the LHCSA employers with whom it had collective bargaining agreements, adding a mandatory arbitration clause preventing any of its home care aide members from enforcing their rights in court.⁵⁸ On May 8, 2020, almost five years later, 1199 petitioned the Court to confirm an arbitration award in which the arbitrator determined that he had jurisdiction over all claims of all aides who had ever been members of 1199, including all retroactive claims and even those accrued by members who had already retired when the MOA was signed.⁵⁹ On March 1, 2022, 1199 filed a petition to confirm a second arbitral award issued on February 25, 2022.⁶⁰ Based on arguments presented by both the union and the LHSCA employers that were contrary to fact, the arbitrator determined that substantially all violations of the 13-Hour Rule had ended by December 31, 2015.⁶¹ The arbitrator then ordered the employers to contribute two-hundred fifty dollars (\$250) for each aide employed during “all or part” of the coverage period into an award fund to be distributed among the more than 110,000 aides he determined were covered by the MOA.⁶²

⁵⁵ *Id.*

⁵⁶ NYSDOH, “Home Health Care Aides and Wage Parity,” <https://dol.ny.gov/home-health-care-aides-and-wage-parity> (last accessed Sept. 30, 2022).

⁵⁷ NYSDOH, “Wage Parity Non-Compliance Referral Form,” <https://survey.alchemer.com/s3/5768115/Wage-Parity-Violation-Referral-Form> (last accessed Sept. 30, 2022).

⁵⁸ Ex. 12, Memorandum of Agreement at 100-101.

⁵⁹ *1199SEIU United Health Care Workers East v. PSC Community Services*, No. 20-cv-03611-JGK (SDNY), Dkt. # 1 (Petition to Confirm Arbitration); Dkt # 1-1 (Arbitration Award, April 17, 2020).

⁶⁰ *Id.*, Dkt. # 183 (Amended Petition).

⁶¹ *Id.*, Dkt. # 183-1 (Arbitration Award, Feb. 25, 2022 at 36, 42-43, 57).

⁶² *Id.* at 53-54.

In April, 2019, employees of CPCHAP were told by president of 1199SEIU that their “live-in” home care members were owed between \$5-\$6 billion in unpaid wages for violations of the 13-Hour Rule.⁶³ Members of Complainants organizations have therefore denounced the arbitration award as “meager crumbs” and protested 1199’s participation in an “insulting” settlement.⁶⁴ Complainants’ members have also appealed both arbitration awards.

IV. TITLE VI VIOLATIONS

Both NYSDOH and NYSDOL have engaged in discrimination against home care aides and Medicaid consumers of color on the basis of their race and national origin for years. The most recent actions falling within the 180-day filing period are described below.

A. NYSDOH Refusal to Rehabilitate the Tools Used to Authorize Care Services

On July 15, 2020, NYSDOH published a notice of proposed rulemaking “[t]o implement a revised assessment process and eligibility criteria” for personal care services and consumer directed personal assistance.⁶⁵ Among the most significant proposals was the insertion of an independent assessor (“IA”) into the care authorization process to perform initial assessments for consumers seeking to receive home care services for the first time.⁶⁶ The amended regulations would also require that all authorizations proposed by Medicaid Managed Care Organizations (“MMCOs”) and any local Department of Social Services (“LDDS”) for more than 12 hours of services per day be reviewed by an independent panel of medical professionals (“IPP”); recommendations by the IPP would then have to be considered by the MCCOs and LDDS prior to finalizing care authorizations.⁶⁷ No changes were proposed to the regulations defining “live-in” and split-shift services and/or determining when those services should be authorized. In response to comments received, NYSDOH issued revisions to its proposed rules on January 27, 2021.⁶⁸

During the notice and comment period for these regulatory changes, NYSDOH received comments from advocates recommending that the IA and IPP reviews include an evaluation of night-time needs, including the availability and adequacy of sleeping accommodations for aides:

⁶³ Ain’t I A Woman, “1199SEIU Tells Home Attendants Industry Will Collapse If They’re Paid Owed Wages,” <https://www.aintiawoman.org/1199-6b-industry-will-collapse> at 12:38 (last accessed Sept. 30, 2022).

⁶⁴ Gothamist, “Coalition Denounces \$30 million compensation decision for home health aides as ‘meager crumbs,’” <https://gothamist.com/news/coalition-denounces-30-million-compensation-decision-for-home-health-aides-as-meager-crumbs> (last accessed Sept. 30, 2022); NBC News, “Home health providers protest 24-hour shifts after ‘insulting’ settlement reached,” <https://www.nbcnews.com/news/asian-america/home-health-providers-protest-24-hour-shifts-insulting-settlement-reac-rcna35027> (last accessed Sept. 30, 2022).

⁶⁵ New York State Department of State, “New York State Register, July 15, 2020,” <https://dos.ny.gov/system/files/documents/2020/10/071520.pdf> at 16 (last accessed Sept. 30, 2022).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ New York State Department of State, “New York State Register, Jan. 27, 2021,” <https://dos.ny.gov/system/files/documents/2021/04/012721.pdf> at 34 (last accessed Oct. 3, 2022).

Commenters stated that this part of the assessment is critical for properly identifying what services should be authorized for an individual and for allowing individuals to remain safely in the community, as MMCOs and LDSS could inaccurately assume that an individual does not require authorization for any night-time need services if this component is not included in the completed CHA.⁶⁹

Additional comments suggested that the IA document whether a home health aide or personal assistant would be able to obtain sufficient sleep and meal breaks and that the regulations specify the consequences should this fail to occur.⁷⁰ Other commenters requested clarification on the IA's role in determining and documenting the rationale for authorizing 24-hour personal care cases.

In response to these comments, NYSDOH stated:

The regulations maintain the requirement to assess and document the frequency of needs throughout a calendar day for cases that involve live-in or 24-hour continuous care, and MMCOs and LDSS may assess and document such needs for other cases as well. As described in current guidance from the Department, this would include identifying night-time needs. These requirements work in concert with the current CHA tool, which has been used for years by MMCOs and LDSS, and will now be used by the IA as the evidence-based validated assessment tool for determining needs for assistance with ADLs and IADLs. The Department has maintained the responsibility to assess frequency of needs with MMCOs and LDSS because the current CHA tool does not ask these questions, and the Department does not have another evidence-based validated assessment tool that can be used for this purpose, as is required under Section 365-a(2)(e)(v) of the Social Services Law. *To the extent that changes to the CHA tool itself are proposed, the Department has taken them under advisement, but has determined that such changes are not immediately needed to implement the IA.*⁷¹

On September 8, 2021, NYSDOH published a notice of adoption of the revised rules.⁷² Although the regulations were originally intended to become effective on November 8, 2021, the implementation date has been pushed to December 1, 2022.⁷³

⁶⁹ Ex. 18, *Summary of Assessment of Public Comment*, https://health.ny.gov/health_care/medicaid/redesign/mrt2/docs/express_terms_summary.pdf at 170 (last accessed Sept. 30, 2022).

⁷⁰ *Id.* at 171.

⁷¹ *Id.* at 170-171 (emphasis added).

⁷² New York State Department of State, “New York State Register, Sept. 8, 2021,” <https://dos.ny.gov/system/files/documents/2021/09/090821.pdf> at 16 (last accessed Oct. 3, 2022).

⁷³ NYSDOH, “New York Independent Assessor,” https://www.health.ny.gov/health_care/medicaid/redesign/nyia/#:~:text=The%20implementation%20date%20of%20the,begin%20on%20May%2016%2C%202022. The implementation date was originally pushed back to May 16, 2022. It was then pushed again to October 1, 2022 before being set for December 1, 2022.

Consistent with its response to commenters and history of discriminatory actions, NYSDOH's final rules do not require the IA or IPP to evaluate consumers' night-time needs and add no guidance by which parties may assess the adequacy of sleeping accommodations for aides. To date, no changes to the CHA tool have been made or announced, and there is no evidence of NYSDOH making any efforts to "assess frequency of needs with MMCOs and LDSS" for consumers wrongly authorized for "live-in" 24-hour services based on its admitted awareness that the assessment tool that has been "used for years" is profoundly deficient.

B. Perpetuation of Harm Through the Distribution of FMAP Funding⁷⁴

On January 1, 2022, NYSDOH began to distribute the first of two tranches of Workforce and Value-Based Payment Directed Payments.⁷⁵ Consisting of \$361 million of FMAP funding, the money was provided to 235 LHCSAs "to strengthen their workforces and prepare for VBP arrangements, with reporting to [NYS]DOH."⁷⁶ The first distribution was completed on March 31, 2022.⁷⁷ A second distribution of \$1 billion was scheduled to begin April 1, 2022 and will conclude by March 31, 2023.⁷⁸

NSYDOH has provided seven broad categories of permitted uses for the FMAP funding, including the adoption of workforce retention and job satisfaction strategies and the development of strategies to recruit and retain a racially and ethnically diverse and culturally competent workforce.⁷⁹ However, NYSDOH has expressly stated that "funding cannot be used to pay for current wage levels for any employees" and "cannot be used to cover existing expenses or legal requirements, even if they fall into the allowable categories."⁸⁰ Therefore, LHCSAs may not use FMAP money to cover the shortfalls created by inadequate reimbursement rates. In effect, NYSDOH requires LHCSAs to continue violating wage protection laws to avoid recoupment of their awarded funds.

⁷⁴ FMAP funding is described by CMS in the following manner, "CMS reimburses each state for a percentage of its total Medicaid expenditures. This percentage, which varies by state, is called the Federal Medical Assistance Percentage (FMAP). FMAP varies by state, based on the state's per capita income. States with lower per capita income typically have a higher FMAP." CMS, "100% FMAP for LTSS – Educate Your State," <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/LTSS-TA-Center/info/100-percent-fmap-educate-your-state#:~:text=CMS%20reimburses%20each%20state%20for,typically%20have%20a%20higher%20FMAP> (last accessed Oct. 4, 2022).

⁷⁵ NYSDOH, "Long-Term Care Workforce and Value-Based Payment Readiness Implementation," https://www.health.ny.gov/health_care/medicaid/redesign/hcbs/enhanced_funding/2022-01_webinar.htm (last accessed Oct. 3, 2022).

⁷⁶ *Id.*; NYSDOH, "Long-Term Care Workforce and VBP Readiness Directed Payment – List of Funded LHCSAs," https://health.ny.gov/health_care/medicaid/redesign/hcbs/enhanced_funding/lhcsa_list.htm (last accessed Oct. 3, 2022).

⁷⁷ *See infra* at note 75.

⁷⁹ *Id.*

⁸⁰ *Id.*

Complainants are confident that most, if not all, of the 235 LCHSAs selected by NYSDOH that employ aides to work 24-hour “live-in” shifts do not pay their aides as required by law. As already described, the assessment tools mandated by NYSDOH fail to adequately capture the information needed to ensure that “live-in” services are authorized in accordance with the law. As a result, many consumers who require continuous assistance throughout a 24-hour period are improperly authorized for “live-in” services only. And because MLTCs reimburse LHCSAs for “live-in” cases at a per diem rate that covers 13 hours only, LHCSAs can only pay the remaining 11 unfunded hours at their own cost. Unsurprisingly, almost all do not. Sampling just the first twenty LCHSAs serving the NYC metropolitan area that were named by NYSDOH as FMAP recipients reveals that only five have not been sued in the last five years.⁸¹ The remaining fifteen LHCSAs have been involved in at least 21 class action lawsuits alleging class-wide violations of the Fair Labor Standards Act, New York Labor Law and WPA, including violations of the 13-Hour Rule: nine of those suits remain in active litigation, eight were settled and four were forced into arbitration.⁸²

Rather than punish these abusive agencies for their lack of compliance with, at least, the WPA, over which it has enforcement powers, NYSDOH has chosen to support the growth of their businesses through FMAP funding. In doing so, NYSDOH perpetuates the longstanding harms it commits against both home care aides and highest-needs consumers. As one home care aide stated,

⁸¹ The first 20 named LHCSAs serving the NY metropolitan area are: 1st Choice Home Care Services, Inc.; Able Healthcare Service, Inc.; Accentcare of New York, Inc.; Advance Home Care LLC; Advantage Management Associates, Inc.; Aides at Home Inc.; Aliah Home Care Inc; Alissa Home Care; All American Homecare Agency Inc.; All Care Home Health Services LLC; All Heart Homecare Agency; All Metro Home Care Services of New York, Inc.; Alliance for Health; Alliance Home Services; Allstar Homecare Agency, Inc; Alternate Staffing, Inc.; Amazing Home Care Services LLC; American Business Institute Corp; American Chore Services; and Americare, Inc. A search through PACER and NYSCEF showed that only Aliah Home Care Inc, Alissa Home Care, All American Homecare Agency Inc., All Heart Homecare Agency, and Allstar Homecare Agency, Inc. have not been sued by aides in the last five years for violations of wage protection laws. However, All American Homecare Agency was the defendant in a *qui tam* settlement with the United States. *See infra* at note 49.

⁸² The ten cases in active litigation are: (1) *Pustilnik v Sincere Care Agency, Inc.*, No. 154444/2018 (Sup. Ct. N.Y.); (2) *Ivory v. All Metro Health Care*, No. 160341/2017 (Sup. Ct. N.Y.); (3) *Guzman v. Americare, Inc.*, No. 24877/2018E (Sup. Ct. N.Y.); (4) *Melamed v. Americare, Inc.*, No. 506155/2016 (Sup. Ct. N.Y.); (5) *Polyakov v. Americare, Inc.*, No. 507515/2017 (Sup. Ct. N.Y.); (6) *Robinson v. Americare, Inc.*, No. 525845/2018 (Sup. Ct. N.Y.); (7) *Bernardez v. Alternate Staffing, Inc.*, No. 150826/2017 (Sup. Ct. N.Y.); (8) *Cedeno v. Amazing Home Care Services, LLC*, No. 42061/2019E (Sup. Ct. N.Y.); (9) *Wen v. American Business Institute, Corp.*, No. 156533/2018 (Sup. Ct. N.Y.). The eight that have settled are: (1) *Adolphe v. 1st Choice Home Care Services, Inc.*, No. 18-cv-05876-ST (EDNY) (settled December 2019); (2) *Cedeno v. Able Health Care Service, Inc.*, No. 154435/2018 (Sup. Ct. N.Y.) (settled June 2021); (3) *Roman v. Advantage Management Assoc., Inc.*, No. 152567/2018 (Sup. Ct. N.Y.) (settled January 2022); (4) *Sanguino v. Aides at Home, Inc.*, No. 20-cv-01255-GRB-AKT (EDNY) (settled December 2020); (5) *Palos v. All American Homecare, Inc.*, No. 17-cv-05360-GBD (SDNY) (settled August 2018); (6) *Cantave v. All Metro Home Care Services of NY, Inc.*, No. 21-cv-3111 (SLC) (SDNY) (November 2021); (7) *Kholbekov v. American Chores Services*, No. 501883/2017 (Sup. Ct. N.Y.) (order granting preliminary approval of class action settlement August 2022); (8) *Borisonskij v. American Chore Services, Inc.*, No. 18-cv-07370-PK (EDNY) (settled May 2019). The cases that have been forced to arbitrate are: (1) *Asatryan v. 1st Aide Home Care Inc.*, No. 651084/2022 (Sup. Ct. N.Y.) (July 2022); (2) *Cabrera v. All Care Home Health Services, LLC.*, 20-cv-01161-MKB-CLP (EDNY) (July 2020); (3) *Narcisco v. Accentcare, Inc.*, No. 505296/2019 (Sup. Ct. N.Y.) (July 2019); (4) *Ahvarado v. Alliance for Health, Inc.*, No. 155417/2018 (Sup. Ct. N.Y.) (June 2019). The two non-class cases have also been filed: *Marcelin v. Americare, Inc.*, No. 19-cv-04039-SMG (EDNY) (settled February 2020) and *Yang v. American Business Institute, Corp.*, No. 713753/2020 (Sup. Ct. N.Y.) (forced into arbitration August 2021).

“The perpetrator of violence could get money, but victims of CPC[HAP]’s violence and abuse like us are forced to continue with 24-hour workdays.”⁸³

C. Failure to Investigate Aide Wage Claims

Although the 1199SEIU arbitration award was not issued until February, 2022, beginning as early as 2018, union members became aware of plans by 1199 to settle the class-wide arbitration for approximately \$250 per aide. In an effort to offset such a manifestly unfair outcome, between December 2018 and March 2020, approximately 120 aides who were covered by the mandatory arbitration agreement and had worked multiple, consecutive 24-hour shifts filed claims with NYSDOL in a concerted effort to enforce the 13-Hour Rule. Many aides filed multiple claims as they had been employed by several different agencies during the relevant statute of limitations period. Since March 2020, as part of the same effort, an additional 238 aides have also filed claims with NYSDOL. Notably, none of the aides who filed claims were born in the United States: 285 of the aides are originally from China, 59 immigrated from Latin American countries, and 14 aides are immigrants from South Korea.

On May 16, 2022, advocates received an email from NYSDOL’s Director of Labor Standards Informing them that NYSDOL had stopped processing wage claims filed by home care aides.⁸⁴ Advocates were not told when this policy had been instituted and how long it would last, however claims filed as early as January, 2022 were identified as unprocessed claims. Advocates are not aware of any similar policy being applied to claims filed by workers in other industries. On August 16, 2022, NYSDOL reported that only 10 of the 120 individuals who filed claims prior to March, 2020 were having their claims actively investigated or processed.⁸⁵ The claims for the remaining aides had all been put on hold pending an “outcome” in the 1199 arbitration.⁸⁶

For these aides, NYSDOL’s “hair-trigger application” of the 13-Hour Rule “to protect workers from the types of abuses that the Department regularly sees” remains a convenient fiction.⁸⁷

D. On-Going Publication of Unlawful Amendments to the Minimum Wage Order

In the Fall of 2018, the Court invalidated NYSDOL’s attempts to amend the Minimum Wage Order covering home care aides.⁸⁸ Those proposed changes would have excluded all meal periods and sleep times from the compensable work time of home care aides working 24-hour shifts by adding the following language:

⁸³ Vimeo, “Stop the Violence of 24-Hour Workdays,” <https://vimeo.com/697611582> at 2:56-3:07.

⁸⁴ Ex. 19, May 18, 2022 Email.

⁸⁵ Ex. 20, Aug. 16, 2022 Email.

⁸⁶ *Id.* It is notable that the term “outcome” is ambiguous as the arbitration award has been issued confirmed by the District Court but has been appealed.

⁸⁷ Ex. 15, Transcript of Oral Argument, *supra* at note 38.

⁸⁸ See discussion *infra* at Part III.B.2.

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.⁸⁹

On July 31, 2019, a formal notice announcing the expiration of the April 25, 2018 version of the emergency Wage Order was published in the State Register.⁹⁰ However, no changes to the Minimum Wage Order itself have ever been made. Instead, even up to the present date, the Wage Order continues to contain the same, objectionable language that was invalidated by the Court.⁹¹

The New York Court of Appeals has clarified and upheld the 13-Hour Rule, which the NYSDOL described as:

a “hair trigger” that immediately makes the employer liable for paying every hour of the 24-hour shift, not just the actual hours worked. Thus, even if a home health care aide sleeps without interruption for four hours and 59 minutes, but is not able to obtain five full hours of sleep, DOL mandates the employer pay for the entire eight hours allotted for sleep.

Andryeyeva, 33 N.Y.3d at 178. Though imperfect and ripe for abuse, the 13-Hour Rule is nevertheless more protective than NYSDOL’s regulations, which permit employers to exclude all sleep and meal time from “live-in” aides’ compensatory time. Without any effort at lawful rulemaking, NYSDOL has amended the Minimum Wage Order to even further deprive “live-in” home care aides of their earned wages.

V. ADVERSE IMPACT

The discriminatory actions of NYSDOH and NYSDOL harm both home care aides and highest-needs Medicaid consumers. However, the specific harms of these two different groups can be distinguished.

A. Harm to Aides Who Work 24-Hour Shifts

Home care aides who have been forced to work 24-hour shifts for only 13-hours of compensation suffer clear economic harms. A home care aide currently employed by a LHCSA based in New York City is entitled to a minimum hourly compensation rate of \$19.09 (\$15 local minimum wage + \$4.09 Wage Parity premium) and overtime premium rate of \$28.64 (\$19.09 x 1.5) per hour. If she works two consecutive 24-hour shifts and, like almost all aides who work “live-in”

⁸⁹ See *infra* at note 36.

⁹⁰ New York State Department of State, “New York State Register, July 31, 2019,” <https://dos.ny.gov/system/files/documents/2019/11/073119.pdf> at 41 (last accessed Oct. 7, 2022). This notice only announced the expiration of the emergency Wage Order published April 25, 2018. No notice of expiration regarding the subsequent emergency re-filings that occurred on July 30, 2018 and Sept. 20, 2018 has ever been published.

⁹¹ Ex. 21, Minimum Wage Order for Miscellaneous Industries and Occupations, <https://dol.ny.gov/system/files/documents/2022/07/cr142.pdf> (last accessed Oct. 3, 2022).

shifts, does not receive three hours of completely duty-free meal breaks and five hours of continuous, uninterrupted sleep, then her weekly, pre-tax earnings should be:

$$\begin{array}{rcc} \text{minimum wage} & \text{overtime premium} & \text{total} \\ [(\$19.09) \times 40 \text{ hrs}] & + [\$28.64 \times (48-40 \text{ hrs})] & = \$992.72 \end{array}$$

Instead, she is almost certain to bring home pre-tax earnings of approximately \$390.00 = \$15.00 x (13 hrs x 2). This is because her employer will only pay her for 13 hours per shift at only the minimum wage rate and will only credit 13 hours per shift towards overtime. As a result, she is paid 61% less than what she is entitled to under the law. Spread out over 52 weeks, she takes home only \$20,280.00 compared to the \$51,621.44 she has actually earned. Each year, she is deprived of \$31,341.44 in income.

This is what happened to Shao Ning Meng. Ms. Meng was employed as a home care aide by Scharome Cares, Inc., a LHCSA based in Brooklyn, NY, from September, 2014 to approximately December, 2021. Throughout the entire time of her employment, she worked consecutive, 24-hour shifts. In March, 2020, Ms. Meng was caring for a woman in her seventies who had Parkinson's disease and could not walk without assistance. Between 10 p.m. and 6:45 a.m. each night, Ms. Meng assisted her patient with using a bedside commode at least five, and occasionally more than seven, times. Ms. Meng never received five hours of continuous, uninterrupted sleep or three hours of completely duty-free meal breaks per shift.⁹² Ms. Meng was better off than many other "live-in" aides, though: when Ms. Meng worked two shifts per week, she was paid \$420.00 per week because Scharome also paid her \$15 per day in spread of hours pay.⁹³

Despite 1199's assertion that violations of the wage protection laws ceased on or around December 31, 2016,⁹⁴ Xiao Huan Yu also experienced the same egregious wage theft. Ms. Yu was employed by CPCHAP from approximately July, 2005 until December, 2018. From 2009 until 2018, she worked multiple consecutive shifts. From 2009 until the end of 2013, Ms. Yu also worked a 12-hour shift in addition to her 24-hour shifts. In January, 2018, Ms. Yu was caring for a consumer who had dementia, required turning and repositioning every two hours and assistance with toileting at least three times each night. Due to the consumer's dementia, the patient would also shout all night – sometimes asking for water, but frequently just yelling in distress.⁹⁵ When Ms. Yu worked two shifts per week, she was paid only \$338.00.⁹⁶ In December, 2018, Ms. Yu began to submit forms to be compensated for "night work." In response, CPCHAP fired her.⁹⁷

⁹² See *infra* at note 9, *Feng v. Elderplan*, Amended Complaint at ¶¶ 23, 105-108.

⁹³ Ex. 22, Meng Paystub. Spread of hours pay is one hour's pay at the basic minimum wage "for any day in which: (a) the spread of hours exceeds 10 hours; or (b) there is a split shift; or (c) both situations occur." 12 N.Y.C.R.R. §§ 142-2.4, 142-3.4.

⁹⁴ See *infra* note 55.

⁹⁵ Ex. 6, July 30, 2019 Letter at 65-66; Vimeo, "Shao Huan Yu," <https://vimeo.com/278986294> at 0:10-0:36.

⁹⁶ Ex. 23, Yu Paystub.

⁹⁷ Ex. 6, July 30, 2019 Letter at 66.

This systematic impoverishment of “live-in” home care aides goes beyond wage theft. It also leads to severe income insecurity. Xue Rou Xie began working for CPCHAP as a home care aide in November, 2007.⁹⁸ From 2007 to 2012, Ms. Xie was assigned to work between four and five consecutive 24-hour shifts each week for a total of 96 to 120 consecutive hours weekly.⁹⁹ From January, 2013 until she retired in June, 2018, Ms. Xie was generally assigned to work three to four consecutive 24-hour shifts per week. Ms. Xie did not sleep and did not have meal breaks when she was working, but was never paid for more than 13 hours per shift.¹⁰⁰ Ms. Xie’s expenses were extremely modest: each month, she paid \$400 in rent, \$300 for food, \$120 in transportation costs, \$100 for clothing and \$20 for her telephone bill; she also sent approximately \$200 each month to her son and very elderly mother-in-law living in China.¹⁰¹ But because the wages she received were so low, after her expenses, Ms. Xie was left with only \$20-\$40 per month to cover emergencies.¹⁰²

Hui Ling Chen is another CPCHAP employee. From January, 2009 until July, 2015, Ms. Chen worked four consecutive 24-hour shifts per week.¹⁰³ From August, 2015 until recently, Ms. Chen worked three consecutive 24-hour shifts per week.¹⁰⁴ Despite working 96 consecutive hours weekly for years, Ms. Chen does not have enough money to cover all of her monthly expenses.¹⁰⁵ In order to survive, she relies on contributions from her son and daughter.¹⁰⁶

Lai Yee Chan has been working for CPCHAP since June, 2000.¹⁰⁷ From 2009 until December, 2014, Ms. Chan worked between three and four consecutive 24-hour shifts.¹⁰⁸ Because her income, added together with her husband’s monthly retirement benefits, was not enough to cover their monthly expenses, Ms. Chan was forced to borrow against her IRA.¹⁰⁹ This most likely means that even after Ms. Chan formally retires she will be forced to continuing working, like Belkis Cid de Bruno.

⁹⁸ *Chan* Complaint at ¶ 24; Ex. 6, July 30, 2019 Letter at 65; *Chan v. Chinese-American Planning*, 16-cv-03569-KBF (SDNY), Dkt. # 19 (Xie Declaration) at ¶ 3.

⁹⁹ *Chan* Complaint at ¶ 36; Ex. 6, July 30, 2019 Letter at 65.

¹⁰⁰ Ex. 6, July 30, 2019 Letter at 60; Xie Declaration at ¶ 4.

¹⁰¹ Xie Declaration at ¶ 8.

¹⁰² *Id.* at ¶ 9.

¹⁰³ *Chan* Complaint at ¶ 23; Ex. 6, July 30, 2019 Letter at 61; *Chan v. Chinese-American Planning*, 16-cv-03569-KBF (SDNY), Dkt. # 16 (Chen Declaration) at ¶¶ 3-4.

¹⁰⁴ Ex. 6, July 30, 2019 Letter at 61.

¹⁰⁵ Chen Declaration at ¶11.

¹⁰⁶ *Id.*

¹⁰⁷ *Chan* Complaint at ¶ 22.

¹⁰⁸ *Id.* at ¶ 34; Ex. 6, July 30, 2019 Letter at 61; *Chan v. Chinese-American Planning*, 16-cv-03569-KBF (SDNY), Dkt. # 15 (Chan Declaration) at ¶ 3.

¹⁰⁹ Chan Declaration at ¶ 14.

Ms. Cid de Bruno has worked for Cooperative Home Care since March, 2014 and has always been scheduled for three consecutive 24-hour shifts per week.¹¹⁰ From September, 2016 to September, 2019, Ms. Cid de Bruno also worked for a second LHCSA, Royal Care Certified Home Health Care, where she was also scheduled for three consecutive 24-hour shifts per week.¹¹¹ For those two years, between the two agencies, Ms. Cid de Bruno worked six 24-hour shifts per week. She never received five hours of sleep or three hours of meal breaks. She was always only paid 13 hours for every 24-hour shift. As Ms. Cid de Bruno describes it, in May, 2022, she “retired.”¹¹² She now receives \$1,050/month in retirement benefits – \$998 from Social Security and \$52 from her 1199 pension. Undoubtedly, her benefits would be higher if they were based on her true earnings, but they are not: instead, she was paid less than half of her earned income and less than half of her true income was covered by Social Security.¹¹³ Now, since her monthly rent alone is \$1,200 per month and she still needs to feed herself and her sick husband, Ms. Cid de Bruno continues to work three 24-hour shifts per week even though the years of working “live-in” shifts, caring for consumers who required total assistance, has left her with chronic health problems.

Debilitating, sometimes permanent, injuries from the physical and psychological demands of working “live-in” 24-hour shifts often accompany the economic harms aides suffer.¹¹⁴ Speaking to NYSDOL, Ms. Yu testified, “For a long time, like many home attendants of 24-hour shifts, I suffer from fatigue, lack of sleep and neurasthenia in order to make a living.”¹¹⁵ As Ms. Chan describes:

Day and night, 24 hours at work without rest. My body aches all over. My nerves have been damaged. I am not able to fall asleep when I go back home. Sometimes, even at home, I still think I’m in my patient’s home. When I hear a sound from outside, I sometimes mistake it for my patient’s cry, so I shout, “I’m coming!”¹¹⁶

Maria Rodriguez worked for First Chinese Presbyterian Community Affairs Home Attendant Corporation (“FCP”) for approximately eighteen years, from 2002 to 2020.¹¹⁷ FCP has a collective bargaining agreement with 1199, so in accordance with her CBA and FCP’s policies and practices, Ms. Rodriguez was paid for only 13 hours for each 24-hour shift.¹¹⁸ From March, 2016, Ms. Rodriguez worked 24-hour shifts exclusively. In January, 2020, Ms. Rodriguez left FCP to work for another agency. There, she continues to work, but not 24-hour shifts. But the years of “live-in” shifts has already taken its toll. The difficulty of the work she had to do and the chronic sleep

¹¹⁰ Ex. 24, Belkis Cid de Bruno NYSDOL Claim Forms at 204.

¹¹¹ *Id.* at 197.

¹¹² The following is based on an NCLEJ Interview with Belkis Cid de Bruno from July 13, 2022.

¹¹³ From January to September 2019, when Ms. Cid de Bruno worked six 24-hour shifts per week, her pre-tax earnings should have been approximately \$148,230. Instead, she more likely was paid, pre-tax, approximately \$60,840.

¹¹⁴ Vimeo, “Stop the Violence of the 24-Hour Workdays,” <https://vimeo.com/697611582> at 0:44-1:18.

¹¹⁵ *Id.* at 1:11-1:17.

¹¹⁶ Vimeo, “24-Hour Workdays,” <https://vimeo.com/286121886> at 2:25-3:36

¹¹⁷ Ex 25, Maria Rodriguez NYSDOL Claim Cover Letter, Jan. 8, 2020.

¹¹⁸ *Id.*; Ex. 26, FCP Home Attendant Handbook, April, 2019 at 209-210.

deprivation she endures has left her body in constant pain.¹¹⁹ She also suffers from chronic fatigue, anxiety and depression. She is tired and wants to rest, but she does not have any savings and she knows that, like Ms. Cid de Bruno, the Social Security and 1199 pension benefits she will receive are not enough to allow her to stop working.

Blanca Minchala will soon celebrate her 70th birthday.¹²⁰ Since coming to the United States from Ecuador in 1999, Ms. Minchala has only worked in home care. In the beginning, she worked privately for consumers in their own homes. Since 2016, she has worked for three different agencies – all for four consecutive 24-hours per week. She has only ever been paid for 13 hours per shift. She has never received five hours of continuous, uninterrupted sleep or three hours of duty-free meal breaks. In her words, “This schedule has ruined my health.” She suffers from enormous stress and anxiety. She sometimes shakes uncontrollably. She has had sudden dizzy spells and panic attacks. She has been experiencing pressure headaches for years. The consumers she cares for are often isolated and depressed, and Ms. Minchala also feels sympathetic pain. When she thinks about her daughter, she cannot stop crying. Although her daughter is now an adult, Ms. Minchala is still overwhelmed with the guilt she experienced for years leaving her daughter behind to go to work. Ms. Minchala has no savings and so many medical bills that she can only barely pay her rent. She wants to stop working, but she cannot afford to.

As Yan Qin Huang, an aide employed by CPCHAP, said, “No one wants to work 24-hour shifts. But would you dare say no to the agency?”¹²¹ Some workers try: Justa Barrios’ doctor gave her a note that she could not work 24 hours anymore, but the agency refused to give her work other than 24-hour shifts, so she just kept on working.¹²² Alvaro Ramirez told his employer FCP that he would no longer work “live-in” shifts, “I said no, I wasn’t going to work 24 hours. Then they said, ‘Alvaro, you are out of the agency.’”¹²³

Shao Ning Meng, Xiao Huan Yu, Xue Rou Xie, Hui Ling Chen, Lai Yee Chan, Belkis Cid de Bruno, Maria Rodriguez, Blanca Minchala, Yan Qin Huang, Justa Barrios and Alvaro Ramirez – they are not unique. Their stories and situations are the norm for “live-in” home care aides. The 110,000 members of 1199, who labor under the same terms and conditions of work that Ms. Yu, Ms. Xie, Ms. Chen, Ms. Chan, Ms. Cid de Bruno, Ms. Rodriguez, Ms. Huang and Mr. Ramirez did, and the aides who work for non-1199 agencies, like, Ms. Meng, Ms. Minchala and Ms. Barrios, suffer the same economic, physical and psychological harms.¹²⁴

¹¹⁹ The following is based on an NCLEJ Interview with Maria Rodriguez from July 21, 2022.

¹²⁰ The following is based on an NCLEJ Interview with Blanca Minchala from July 25, 2022.

¹²¹ Vimeo, “24-Hour Workdays,” <https://vimeo.com/286121886> at 6:36-6:39.

¹²² Vimeo, “Stop the Violence of 24-Hour Workdays,” <https://vimeo.com/697611582> at 1:19-1:27.

¹²³ Vimeo, “24-Hour Workdays,” <https://vimeo.com/286121886> at 6:39-6:48.

¹²⁴ Notably, though, because Ms. Meng’s LHCSA was not an 1199 union shop, Ms. Meng was not bound by any mandatory arbitration agreement. She and five of her coworkers were able to go into Court to recover some of their unpaid wages. In December, 2021, Scharome Cares, Inc. settled with Ms. Meng and her co-plaintiffs for a total of \$600,000, representing all of the plaintiffs’ unpaid minimum wage and overtime damages based on their actual rate of pay for all 24 hours of every shift worked, the total amount of all minimum compensation due pursuant to the Wage Parity Act for the additional eleven hours per shift that were not credited by Scharome as compensable hours, and

Despite years of litigation, arbitration, public testimony and protests, the “picture of rampant and unchecked years-long exploitation” described by the NY Court of Appeals in 2019 has remained unchanged. As one worker has said, “It doesn’t make any sense that I’m sitting here working so hard to get nothing for it. I feel like it’s slavery.”¹²⁵ It will remain unchanged unless NYSDOH and NYSDOL are forced to end their discriminatory actions against home care aides.

B. Harm to Highest-Need Consumers

NYSDOH’s refusal to ensure proper compliance with the regulations around personal care services and the consumer directed personal assistance program causes direct and obvious harm to Medicaid consumers. By forcing MLTCs and the IA to use an assessment tool that fails to accurately capture consumers’ night-time needs, failing to issue clear standards to determine whether sleeping accommodations provided to aides are “adequate,” and deliberately ignoring the financial incentives for MLTCs to systematically under-authorize services for consumers, NYSDOH has created and perpetuated a fundamentally flawed process for delivering care to consumers with the highest needs:

Because of a lack of accountability from the state, many consumers who deserve continuous care are not assessed at the proper level and do not receive it. A 2016 report by Medicaid Matters New York and the National Academy of Elder Law Attorneys - New York Chapter, found that managed care plans were systematically issuing unjustified reductions in consumer hours, reductions that were overturned on fair hearing over 98% of the time.

Specifically, of the 22 cases in the cohort receiving continuous care, 12 would have been lowered to 24-hour live-in and the remaining 10 would have been lowered even more dramatically. In fact, the study determined that plans would have reduced hours by over 19,000 had fair hearings not intervened to stop them.¹²⁶

Rather than rehabilitate a flawed system, NYSDOH and NYSDOL instead pit consumers and workers against each other by advancing the false narrative that stealing workers’ wages is the only way to “prevent the collapse of the home care industry.”¹²⁷ Consumers are then made to choose between insufficient care or institutionalization. José Hernandez described the Hobson’s choice presented to him at a recent New York City Council hearing:

I experienced a spinal cord injury back in 1995 when I was just 15 years old. Initially when I was released from the hospital I was authorized for a 2 - 12

approximately twenty-percent in liquidated damages. See *Feng v. Elderplan, Inc.*, 20-CV-2049 (JPC)(JLC) (SDNY), Dkt # 84 (Joint Letter) at 3.

¹²⁵ Vimeo, “24-Hour Workdays,” <https://vimeo.com/286121886> at 12:55-13:00.

¹²⁶ Ex. 27, NYC Council Hearing Testimony of Bryan O’Malley at 215-216 (also available at <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11255997&GUID=5E71649C-1DF0-46B5-BD2E-BB6E968589D5>, last accessed Oct. 3, 2022).

¹²⁷ See discussion *infra* at Part III.B.2.

hour split shift. A year after being home a worker from HRA came into my home and gave me an ultimatum - sign paperwork to convert my case to a 24 hour live-in case or go into a nursing home. As a scared teenager, I signed the form and had a live-in case for the next 16 years.¹²⁸

To some consumers, though, who are marginalized by their ethnicity as well as their age and disability, the distinction between the two types of 24-hour services is not always made clear. Ms. Chan receives 24-hour live in services from CPCHAP. She says, “To the patient, if you assign a home attendant for [a] 24-hour shift and then tell her not to do so [work all 24-hours], this is just not right. It’s cheating the patient. If the patient gets hurt because of this, will CPC have peace of mind?”¹²⁹ To people like Ms. Chan and the aides who were assigned to her, 24-hour services means 24-hours of work, even at the risk of deteriorating care as aides become exhausted and injured, because there are no other options. As Jean Ryan, the president of Disabled In Action of Metropolitan NY, testified:

When my husband became seriously disabled and ill, he could not get the care he needed. He needed 24 hours and the state offered live-in care, but I knew that the aides would not get enough sleep, nor would they be able to care for him adequately at night because he needed a lot of care at night. It was a huge dilemma.¹³⁰

Consumers can also be caught in LHCSA’s efforts to evade legal liability for failing to follow the 13-Hour Rule. When Hui Ling Chen started to submit to CPCHAP “night work” forms to be compensated for her interrupted sleep:

CPC called the patient’s son and portrayed our detailed record-keeping to the patient’s family as if I was complaining that the patient was getting up so many times. CPC even told the family that if the patient continued to need care at night, the patient would have to be sent to a nursing home.¹³¹

Other workers from CPCHAP reported similar stories. Because of medication she was taking, Xiao Wen Zhen’s patient required frequent help with toileting during the night. When CPCHAP learned of this, “[m]y client’s nurse has told my client that they can only get up with my assistance twice

¹²⁸ Ex. 27, NYC Council Hearing Testimony of José Hernandez at 221 (also available at <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11255997&GUID=5E71649C-1DF0-46B5-BD2E-BB6E968589D5>, last accessed Oct. 3, 2022).

¹²⁹ Vimeo, “24-Hour Workdays,” <https://vimeo.com/286121886> at 10:08-10:22.

¹³⁰ Ex. 27, NYC Council Hearing Testimony of Jean Ryan at 220 (also available at <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11255997&GUID=5E71649C-1DF0-46B5-BD2E-BB6E968589D5>, last accessed Oct. 3, 2022).

¹³¹ Lee, David, *The Nonprofit War on Workers* at 93, https://assembly.state.ny.us/write/upload/member_files/040/pdfs/20220104_0100283.pdf (last accessed on Oct. 3, 2022).

during the night, and that there is not enough money to pay me to help the client more than twice each night.”¹³² Xiao Huan Yu said:

My agency told me not to get up at night, unless something bad had happened to the patient. The patient needed 24 hours of care, so of course I had to look after her 24 hours a day. But the agency told the patient, “We don’t pay for the night hours, so don’t call the home attendant at night. If you insist on calling the home attendant, you should either change agency or install a surveillance camera.”¹³³

Lai Yee Chan was instructed by CPCHAP to stop attending to her consumer after 9pm.¹³⁴ Instead, she was told, she should simply call 911 if the patient developed any serious nighttime issues.¹³⁵ Ms. Chan’s patient was also told that if she continued to request help at night, CPCHAP would have no choice but to send her to a nursing home.¹³⁶ Ms. Chan refused to comply. She continued to assist the consumer and submit forms for compensation.¹³⁷ In response, Ms. Chan was fired and her consumer was assigned a new aide – one who, when asked to choose between her job and her consumer, chose her job.¹³⁸

VI. DISPROPORTIONALITY

Title VI prohibits discrimination based on race, color, and national origin in federal programs. Discrimination need not be facially obvious in the law to violate Title VI: it is enough to demonstrate that a policy or practice creates a disparate, harmful impact.¹³⁹ Claimants must show that: (1) there is an adversity or harm being suffered; (2) that harm is disproportionately felt based on race, color, or national origin; and (3) that harm is caused by a particular agency policy.¹⁴⁰

Above, this complaint has detailed the significant harms stemming directly from the 13-Hour Rule, the assessment process for 24-hour versus split-shift care, and the refusal to investigate claims against and to regulate the employers of home care aide. These adverse impacts disproportionately affect New York State’s low-income, immigrant women of color and the disabled people of color community. There is a clear and deleterious disparate impact of NYSDOH and NYSDOL policies based on race and nationality.

¹³² Ex. 28, Affidavit of Xiao Wen Zhen at ¶ 8-9.

¹³³ Vimeo, “Shao Huan Yu,” <https://vimeo.com/278986294> at 0:58-1:21.

¹³⁴ Ex. 6, July 30, 2019 Letter at 61.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*; *see, also, infra* note 124 at 98.

¹³⁹ *See* United States Department of Justice, “Title VI Legal Manual: Section VII – Proving Discrimination – Disparate Impact,” <https://www.justice.gov/crt/fcs/T6Manual7#D> (last accessed Oct. 3, 2022).

¹⁴⁰ *Id.*

A. Home Care Aides

The home care aide population of New York is predominantly immigrant women of color. In 2020, 81% of all direct care workers in NY identified as non-white: thirty-two percent (32%) identified as Black, thirty-two percent (32%) as Hispanic or Latino, fourteen percent (14%) as Asian or Pacific Islander, and four-percent (4%) as non-white other.¹⁴¹ In that same year, sixty-seven (67%) of workers were either U.S. citizens by naturalization or non-citizens.¹⁴² These demographics stand in stark contrast to workers in other direct care categories or medical fields: seventy-three percent (73%) of residential care home workers are U.S. citizens by birth and forty-five percent (45%) are white;¹⁴³ and, in 2021, only thirty-percent (30%) of nurse practitioners in New York identified as non-white.¹⁴⁴

More than half of the state's estimated home care workforce is employed in New York City.¹⁴⁵ Even in New York City, home care aides are more likely to be immigrants and people of color than the general population: approximately twenty-four percent (24%) of NYC identifies as Black or African-American, a difference of twelve percent (12%) from home care aides.¹⁴⁶ Immigrants compose about thirty-seven percent (37%) of New York City's population.¹⁴⁷

Home care aides are significantly more likely to be people of color and immigrants than both the general population of New York and the population of other health care fields in the state. Because of the demographics of the home care aide population, a policy that affects this population requires careful scrutiny to identify and address areas of racial and xenophobic bias and disparate impact. When a particular profession is primarily composed of marginalized individuals based on race and nationality, policies that do damage to that profession's health, wealth, and safety have a discriminatory disparate impact.¹⁴⁸

B. Consumers of Medicaid Managed Long-Term Home Care Services

Data provided by NYSDOH suggests that the majority of consumers of long-term care services in New York are also people of color. Since 2013, 436,941 people have enrolled in an MLTC. Of that number, twenty-four percent (24%) identified as white, twenty-two percent (22%) as

¹⁴¹ See *infra* at note 1.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Center for Health Workforce Studies, *Research Brief - Nurse Practitioner Diversity in New York State, January 2021*, https://www.chwsny.org/wp-content/uploads/2021/01/NP-Diversity-Brief_2021.pdf (last accessed Oct. 3, 2022).

¹⁴⁵ New York State Office for the Aging, *Impact of Increasing Wages for Home Health Care Workers in New York State*, https://www.nysenate.gov/sites/default/files/cipa_capstone_final_report_office_of_aging2613.pdf (last accessed Oct. 3, 2022).

¹⁴⁶ United States Census Bureau, "Quick Facts, New York City, New York," <https://www.census.gov/quickfacts/newyorkcitynewyork> (last accessed Oct. 3, 2022).

¹⁴⁷ The Mayor's Office for Economic Opportunity, *An Economic Profile of Immigrants in New York City 2017*, <https://www1.nyc.gov/site/opportunity/reports/immigrant-economic-profile.page> (last accessed Oct. 3, 2022).

¹⁴⁸ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Black, twenty percent (20%) as Hispanic, fourteen percent (14%) as Asian, four percent (4%) as Native American and sixteen percent (16%) as other.¹⁴⁹

Advocates have also found that, of the twenty-five zip codes in NYC with the highest percentage of disabled people utilizing long-term care services through the consumer directed program, approximately sixteen of those are located in South Bronx, where thirty-nine percent (39%) of the population is Black and sixty percent (60%) is Hispanic;¹⁵⁰ other zip codes include Manhattan's Chinatown.

By contrast, in 2016 approximately sixty-three percent (63%) of all disabled people in New York were white.¹⁵¹ The Medicaid long-term care consumer population is, therefore, significantly more likely to be people of color than the general disabled population in New York State and much more likely to suffer from the effects of NYSDOH and NYSDOL's policies on the basis of their race.

VII. RELIEF

Complainants request the following relief with respect to NYSDOH:

- (a) NYSDOH revise the Uniform Assessment System ("UAS-NY") to adequately and accurately assess the ability of aides to obtain five hours daily of continuous, uninterrupted sleep during an eight-hour period of sleep so that consumers are correctly authorized for split-shift services pursuant to 18 N.Y.C.R.R. §§ 505.14, 505.28;
- (b) NYSDOH direct contracted MLTCs and MCOs to reassess all home care consumers authorized for "live-in" 24-hour services and immediately reauthorize those who qualify for split-shift services; audit all reassessments and reauthorizations and make public the results of such audit; and exclude MLTCs and MCOs from providing Medicaid services if they are found to under-authorize consumers who are entitled to split-shift services;
- (c) NYSDOH audit all authorization changes since January 1, 2022 resulting in reduced home care hours; make public the results of such audit; and exclude all MLTCs and MCOs from providing Medicaid services if they are found to under-authorize consumers who are entitled to split-shift services; and

¹⁴⁹ See *infra* at note 3.

¹⁵⁰ ICIS, South Bronx Environmental Health and Policy Study, https://www.icisnyu.org/south_bronx/Demographics_001.html#:~:text=Race%20%26%20Ethnicity&text=39%25%20of%20this%20population%20is,City%2C%20or%20New%20York%20State (last accessed Oct. 6, 2022).

¹⁵¹ Cornell University, 2016 Disability Status Report – New York, https://www.disabilitystatistics.org/StatusReports/2016-PDF/2016-StatusReport_NY.pdf?CFID=13933427&CFTO= (last accessed Oct. 3, 2022).

- (d) NYSDOH initiate public rulemaking procedures to define “adequate sleeping accommodations” for personal care aides as required by 18 N.Y.C.R.R. § 505.14 for the lawful authorization of split-shift services.

Complainants request the following relief with respect to NYSDOL:

- (a) NYSDOL immediately rescind and nullify all unlawful amendments to the Miscellaneous Industries and Occupations Minimum Wage Order related to “live-in” home care services promulgated between October 2017 and the present date;
- (b) NYSDOL issue Orders to Comply within three months for all claims filed by home care aides on or before September 2022 for the full amount of unpaid wages, overtime and spread of hours pay, including the full amount of statutory liquidated damages, against LHCSA, MCO and MLTC employers; and
- (c) NYSDOL convene a Wage Board for the purpose of developing a Home Care Industry Minimum Wage Order.

Complainants request the following relief with respect to NYSDOH and NYSDOL:

- (a) NYSDOH and NYSDOL audit all MLTCs, CHHAs and LHCSAs to ascertain compliance with state and federal labor laws and New York Home Care Worker Wage Parity Act, make public the results of such audit and order the forfeiture of contracts with and payments already made to those found to violate the law and initiate criminal penalties as set forth in N.Y. Pub. Health Law § 3614-c(7-a); and
- (b) NYSDOH issue official guidance to all MLTCs, CHHAs and LHCSAs directing that overtime premiums be calculated using the Wage Parity minimum compensation rate as the regular rate.

Complainants also request that the investigations of NYSDOH and NYSDOL be consolidated. Although NYSDOH is a funding recipient of HHS and NYSDOL is a funding recipient of DOL, the violations raised by Complainants are so interlinked across the programmatic activities of both HHS and DOL and impact both consumers and workers that effective remedial action requires coordination between the two federal agencies. Complainants further request that the Civil Rights Division of the Department of Justice play an active role in ensuring consistent and comprehensive investigative and enforcement actions.

Sincerely,

/s/ Carmela Huang

Carmela Huang
Leah Lotto

National Center for Law and Economic Justice
50 Broadway, Suite 1500
New York, NY 10004-3821

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Exhibit 28	Affidavit of Xiao Wen Zhen, May 2, 2018

Exhibit 1

New York State Data on MLTC Enrollment by Race

October 3, 2022

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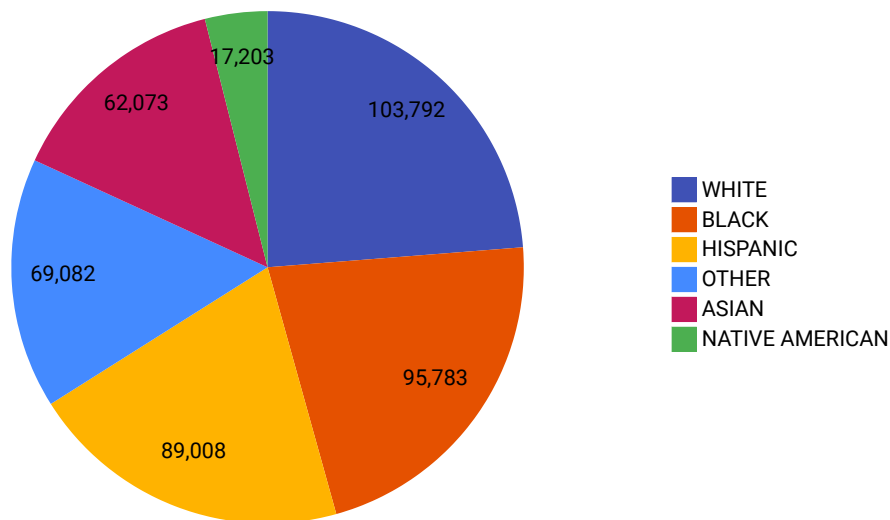
MLTC Enrollment by Race

MLTC Enrollment by Race CommunityHealth

More Info ▼

- Plan Type
- Race

Chart
 Summary Table
 Chart View



Summary Table View

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Row count unavailable.

Click and drag to pan the chart

[View Source Data](#) →



Eligibility Year	Eligibility Month	Economic Region	Aid Category	Dual Eligible	Managed Care vs. Fee For Service	Plan Name	Plan Type	Gender
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC	Female
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC	Female
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC	Female
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC	Female

Filters (2) ✕ Clear All

Plan Type: PARTIAL MLTC ▼

Race: Select... ▼

Eligibility Year: 9 selected ▼

[Skip to Main Content](#)



MLTC Enrollment by Race

Edit



MLTC Enrollment by Race CommunityHealth

Export

More Info ▼

Drill Up	Hierarchy	Reset

- Plan Type
- Race

Chart Summary Table

Chart View

Summary Table View

Race	Count of Rows	Percent of Total
WHITE	103,792	24%
BLACK	95,783	22%
HISPANIC	89,008	20%
OTHER	69,082	16%
ASIAN	62,073	14%
NATIVE AMERICAN	17,203	4%

Previous

Next

Showing all 6 rows

Click and drag to pan the chart

[View Source Data](#)



Eligibility Year	Eligibility Month	Economic Region	Aid Category	Dual Eligible	Managed Care vs. Fee For Service	Plan Name	Plan Type
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC
2021	12	Western	TANF/SN	YES	MMC	KALOS HEALTH	PARTIAL MLTC

Filters (2) ✕

Clear All

Plan Type

PARTIAL MLTC ▼

Race

Select... ▼

Eligibility Year

9 selected ▼

Exhibit 2

New York State Department of Labor Request for Opinion Letter

March 11, 2010



New York State Department of Labor
David A. Paterson, Governor
Colleen Gardner, Commissioner

March 11, 2010

[REDACTED]

Re: Request for Opinion
Live-In Companions
RO-09-0169

Dear [REDACTED]:

I have been asked to respond to your letter dated November 23, 2009, in which you ask several questions regarding employees providing "companionship services" within the meaning of the federal Fair Labor Standards Act (FLSA) exemption for such services. Your letter asks four questions for which you request that it be assumed that your client's employees are within the FLSA companionship exemption. Each of your questions is discussed individually below.

1. *Under New York State Law, must my client pay these home health aides overtime? If so, after how many hours of work during a particular week does that obligation obtain, and under which state statute/regulation(s)?*

The New York State Minimum Wage Act, which contains the State minimum wage and overtime provisions, generally applies to all individuals who fall within its definition of "employee." (*see*, Labor Law §651 *et seq.*) Section 651(5) defines "employee" as "any individual employed or permitted to work by an employer in any occupation," but excludes fifteen categories of workers from that definition. (*see*, Labor Law §651(5)(a-o).) Subpart 2.2 of the Minimum Wage Order for Miscellaneous Industries and Occupations (12 NYCRR §142-2.2) provides, in relevant part, that all "employees" must be paid at a rate not less than one and one half times their regular rate of pay in accordance with the provisions and exceptions of the FLSA. Subpart 2.2 also provides that employees exempted under Section 13 of the FLSA must nevertheless be paid overtime at a rate not less than one and one half times the minimum wage. In short, "exempt" employees under Section 13 of the FLSA must be paid at a rate of not less than one and one half times the minimum wage for overtime hours worked unless such employees fall outside of the New York Minimum Wage Act's definition of "employee."

Tel: (518) 457-4380, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

Your letter requests that the Department assume that the employees in question fit within the "companionship services" exemption of the FLSA. Since that exemption is contained in Section 13 of the FLSA (29 USC §213(a)(15)), the employees described in your letter are required to be paid not less than one and one half times the minimum wage rate for all hours worked in excess of forty hours per workweek should such individuals be non-residential employees, and forty-four hours per workweek should they be residential employees.¹ However, it is worth noting that such employees are nevertheless subject to the remaining provisions of the Minimum Wage Orders including, for example, the requirement that employees be paid not less than the minimum wage, for spread of hours pay, call-in pay, and split-shift pay.

It is worth noting that Article 19 of the New York State Labor Law [Minimum Wage Act] excludes "companions" from its definition of "employee," and therefore from the coverage of the Minimum Wage Orders. (Labor Law §651(5)(a).) That provision provides that "someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping" is excluded from the definition of the term "employee." (Id.) In *Settlement Home Care v. Industrial Board of Appeals*, 151 A.D.2d 580, 581 (2d Dep't 1989), the Third Department affirmed a decision of the Industrial Board of Appeals holding that "sleep-in home attendants" did not fall within the exception contained in Section 651(5)(a) and noted that the exemption may not be found applicable unless "all of the statutory requirements have been established." (Id. at 582 [Emphasis added]). The Court set forth three mandatory requirements, which it derived directly from Section 651(5)(a), to determine whether an employee fits within the "companionship exception": (1) the individual must "live in the home of an employer," (2) the individual must be employed "for the purpose of serving as a companion to a sick, convalescing or elderly person," and (3) that the individual's "principle duties do not include housekeeping." (Id. at 582-583.) Since your letter does not request an evaluation of the applicability of that exception, or sufficient facts upon which to make such an evaluation, no opinion is offered as to its applicability at this time.

2. *Would your answer to "1," above, change if the home health care aide's hourly wage exceeded the New York State minimum wage?*

As the answer to the question above states, the employees described in your letter are not exempted from the requirement that the minimum wage be paid as no exception to the applicability of the State Minimum Wage Act has been shown to apply. However, should the employees be paid in excess of one and one half times the minimum wage rate, no premium payment is required for any overtime hours worked.

3. *Would your answer to "1," above, change if the home health aide was a licensed practical nurse?*

¹ Residential employee is defined by 12 NYCRR §142-2.1 as "one who lives on the premises of the employer." For further discussion of "residential employees," please see the decision of the Second Department in *Settlement Home Care v. Industrial Bd. of Appeals of Dep't of Labor*, 151 A.D.2d 580 (1989).

Please be advised that licensed practical nurses do not fit within the "companionship services" exemption to the FLSA and, as such, such individuals would be subject to the overtime provisions in both the FLSA and the New York State Labor Law. (See, 29 USC §213(a)(15); 29 CFR Part 541; FLSA Fact Sheet No. 25.)

4. *Under New York State law, must my client pay the "spread" set forth at 12 NYCRR Section 142-2.4 when an aide's work exceeds 10 hours?*

Regulation 12 NYCRR §142-2.4(1) states that "[a]n employee shall receive one hour's pay at the minimum hourly wage rate, in addition to the minimum wage required by this part for any day in which: (a) the spread of hours exceeds 10 hours..." The term "spread of hours" is defined by 12 NYCRR §142-1.28 as "the interval between the beginning and end of an employee's workday. The spread of hours includes working time plus time off for meals plus intervals off duty." The "spread of hours" regulation applies to all "employees" defined in 12 NYCRR §142-2.14 regardless of whether such employees fit with a FLSA exemption for overtime pay (except those persons exempted from the definition of "employee" as set forth in Section 651(5) of the Labor Law). It is important to note that the "spread of hours" regulation does not require all employees to be paid for an additional hour, but merely that the total wages paid be equal to or greater than the total due for all hours at the minimum wage and overtime rate, plus one additional hour at the minimum wage for each day in which a "spread" is required to be paid.

As stated above, since nothing in your letter provides a basis to exclude the employees in question from the requirement of the Minimum Wage Orders, it appears that your client is required to pay the "spread" set forth in the Minimum Wage Orders as described above.

5. *Under New York State law, if a home health care aide "lives in," what hours count towards calculating a ten hour day?*

To answer this question, it is necessary to determine the number of hours worked by a live-in employee. To do so, we must distinguish between "on call" and "subject to call" time as employees must be paid for all time spent "on call." "On call" time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. Employees who are "on call" are considered to be working during all the hours that they are confined to the workplace including those hours in which they do not actually perform their duties. "Subject to call" time is that time in which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, employees who are "subject to call" may be restricted to a specified area, to be reachable by telephone or otherwise, to report to the work assignments within 15 to 30 minutes, etc. In cases in which an employee is "subject to call," working time starts when they are actually ordered to a specific assignment or at the time in which they perform work for the employer.

Regulation 12 NYCRR §142-2.1 provides that the minimum wage shall be paid to employees for the time an employee is permitted to work or is required to be available to work at

a place prescribed by the employer. However, that regulation provides that "residential employees," those who live on the premises of their employer, are not deemed to be working during normal sleeping hours merely because the employee is "on call" for those hours or at any time the employee is free to leave the place of employment. Since your letter does not state the nature of the premises in which the aides in question are living, a definitive determination as to whether the individuals fall within that definition cannot be made. While this distinction is important for the purposes of determining the number of hours at which overtime is owed (44 for residential employees vs. 40 for non-residential employees), the Department applies the same test for determining the number of hours worked by all live-in employees.


In interpreting these provisions, it is the opinion and policy of this Department that live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

Therefore, a live-in employee is required to be paid "spread of hours" pay for all days in which he or she works as a live-in employee since such employee is deemed to work, at a minimum under the rubric described above, thirteen hours per day.

This opinion is based on the information provided in your letter dated November, 23 2009. A different opinion might result if the circumstances stated therein change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By: 
Jeffery G. Shapiro
Associate Attorney

JGS:mp

cc: Carmine Ruberto



Exhibit 3

New York State Department of Labor Request for Opinion Letter

July 14, 1995



COUNSEL'S OFFICE

STATE OF NEW YORK
DEPARTMENT OF LABORONE MAIN STREET
BROOKLYN, NY 11201
(718) 797-7388

July 14, 1995

Berenice V. Figueredo, Esq.
Jackson, Lewis, Schnitzler & Krupman
Courthouse Plaza
60 Washington Street
Morristown, New Jersey 07960-6844

Re: Request for Opinion
Compensation of Home Health Aides

Dear Ms. Figueredo:

Your June 26, 1995 letter to Nancy G. Groenwegen, former Deputy Commissioner of Labor for Legal Affairs and Counsel, requests an opinion regarding various legal issues involved in the compensation of persons employed by your client to provide home health care services to persons with disabilities, who reside in the homes of such disabled persons. Some of these employees are foster care providers who provide services to a disabled individual residing in such employees' homes. Your letter assumes that all the employees described therein are exempted from minimum wage and overtime coverage under the Fair Labor Standards Act, pursuant to 29 U.S.C. §213(a)(15), as employees employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves, as such terms are defined at 29 CFR Part 552.

You ask, first, whether New York "recognizes" the above-cited exemption under the Fair Labor Standards Act. The Minimum Wage Order for Miscellaneous Industries and Occupations, 12 NYCRR §142-2.2, which covers, *inter alia*, the home health care industry, provides, in pertinent part, as follows:

An employer shall pay an employee for overtime at a wage rate of $1\frac{1}{2}$ times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 *et seq.*, the Fair Labor Standards Act of 1938, as amended; provided, however, that the exemptions set forth in

section 13(a)(2) and (a)(4) of such act shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(2) and (a)(4) of such act, overtime at a wage rate of 1½ times the basic minimum hourly rate. [...]

Accordingly, persons subject to the above-cited exemption need not be paid for overtime at a wage rate of one and one-half their regular rate; however, such persons, if they come within the definition of "employee" as set forth in Section 651(5) of the Labor Law and 12 NYCRR §142-2.16, must be paid at least \$4.25 per hour for regular hours worked and for overtime at a wage rate of one and one-half times the basic minimum hourly rate, i.e., \$6.375.

You ask, next, whether New York follows the current enforcement practice of the United States Department of Labor with respect to the provisions of 29 CFR Part 552 in requiring that the home care agency and the disabled person who is the recipient of the home health care services be joint employers of the home health aide in order for such employee to come within the exemption set forth at 29 U.S.C. §213(a)(15). In determining whether an employee comes within an exemption from coverage under the Fair Labor Standards Act, New York defers to the policies and interpretations followed by the United States Department of Labor.

In connection with your inquiry, you should be aware that, pursuant to Section 651(5)(a) of the Labor Law and 12 NYCRR §142-2.16(c)(ii), persons who live in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping, are excluded from the definition of the term "employee" under the Minimum Wage Act and Orders, and are, accordingly, entirely exempted from minimum wage and overtime coverage under New York law. However, in a case involving home health aides employed by home care agencies under contract with the New York City Human Resources Administration to provide services to Medicaid recipients, the Supreme Court, Appellate Division, Second Department held that such persons are not subject to the above-cited New York "companion" exemption, as the Medicaid recipients in whose homes they lived were not "employers", they were not "companions", and their principal duties included housekeeping. [See, Settlement Home Care, Inc. v. Industrial Board of Appeals of the Department of Labor of the State of New York, 151 A.D.2d 580 (2d Dept. 1989).] The employees in issue in that case had been determined by the United States Department of Labor to come within the exemption set forth at 29 U.S.C. §213(a)(15). Therefore, the fact that an employee comes within this exemption is not determinative of whether that employee comes within the analogous New York exemption.

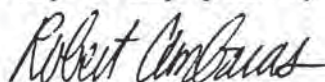
Accordingly, in further response to your questions regarding the existence of a joint employment relationship between the home care agency and the recipient of services (as employers) and the home health aide (as employee), New York does not consider the recipient of services in the circumstances set forth in your letter to be an "employer", and, therefore, the home health aide would be covered by New York minimum wage and overtime requirements. This is also partially responsive to your inquiry whether the home health aide can be excluded from the definition of "employee" under the New York Labor Law and Minimum Wage Orders if the home care agency is "merely the facilitator of the foster care relationship between the person with the disability and the home care worker". If the home care agency acts as the home health aide's employer and pays his or her wages, then such agency is not "merely a facilitator" and the home health aide is its employee. If, on the other hand, the home care agency is a licensed employment agency and places the home health aide in the home of the person with the disability (who pays the home health aide's wages and acts alone as his or her employer), then the home health aide is that person's employee and may be excluded from the definition of "employee" if the home health aide is a "companion" as defined under New York law and his or her principal duties do not include housekeeping.

You also ask a number of questions regarding the manner in which home health aides must be compensated. With regard to "live-in" home health aides, who reside in the home of the recipient of services, to the extent that such persons are required to remain "on call" in the recipient's home on a 24-hour-per-day basis, it is the policy of the New York State Department of Labor that such persons must be paid for no less than 13 hours for each such 24-hour period, provided that they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. If a "live-in" home health aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable, and the home health aide must be paid for all eight hours in question. Similarly, if a "live-in" home health aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable. If a "live-in" home health aide is relieved of his or her duties for a defined period of time, whether by another home health aide or a relative of the disabled person, or because of the absence of the disabled person, and is free to leave the home of the disabled person, that home health aide need not be compensated for any such period. However, with the exception of the aforementioned sleep and meal period exclusions, a "live-in" home health aide must be compensated for all hours he or she is required to remain "on call" in the home of the disabled person, regardless of the amount of time spent in performing concretely defined tasks. The Department of Labor does not consider it feasible to record "actual hours of work" under these circumstances. A "live-in" home health aide must be paid at least \$4.25 per hour for all hours deemed to be worked up to 44 hours in a workweek, and at least \$6.375 per hour for all additional

hours worked in a workweek. [The Department of Labor applies the 44-hour overtime threshold, set forth in 12 NYCRR §142-2.2 for a "residential employee" (defined at 12 NYCRR §142-2.1(d) as "one who lives on the premises of the employer") even though the disabled recipient of service is generally not the home health aide's employer.] The foregoing policies also apply to "live-in" home health aides who reside in the disabled person's home only on a particular weekend. With regard to non-"live-in" home health aides, who do not reside in the home of the disabled recipient of services, such persons must be paid at least \$4.25 per hour for all hours up to 40 hours in a workweek, and at least \$6.375 per hour for all additional hours in a workweek, during which such persons are required to remain "on call" in the recipient's home, regardless of the amount of time spent in performing concretely defined tasks, with the exception of time actually afforded for sleeping and eating.

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (718) 797-7310.

Very truly yours,



Robert Ambaras
Senior Attorney

RA:ee

Exhibit 4

**New York State Department of Labor
Record Regarding *Matter of Chinese Staff
and Workers Association v. Commissioner
of Labor***

(excerpted)

INTER-OFFICE MEMORANDUM

To: Staff of the Information Room

Date: March 19, 1980

Office:

From: Stanley J. Serocki, Supervisor ASU

Office:

Subject: Determining Working Hours
Home Health Attendants

Attached are excerpts from the Manual of Interpretations for the Miscellaneous Industries and Occupations. The excerpts deal with the determination of working time when employees work 24 hour shifts, when they are on call or when they are subject to call.

These excerpts will become increasingly more important as references since we are receiving many complaints from home health attendants working for a profitmaking institution..

Please also review the attached narrative concerning coverage. In order to be exempt from minimum wage coverage, the companion must work in the home of the employer.

SS:s
Atts.

cc: Mrs. Blanche Cohen
Mr. Sol Friedman,
Mr. Fred Unger ✓
Mr. Nat Ferster
Mr. Morton Oken
Mr. Martin Finn
Ms. Ricki Kershner

DEFINITIONS

142-2.15 Employee

"Employee" means any individual permitted to work by an employer. In certain occupations, there have been cases of alleged independent contractor status. The mere label of "independent contractor" does not necessarily remove someone from the category of a worker. However -

Where barbers, bootblacks, and manicurists in barber shops alleged to be independent contractors, earn well over the minimum wages from all sources of income, including gratuities, we will administratively accept the situation without spending time to secure legal clearance on whether an employer/employee relationship exists. Where earnings are borderline, and a record of hours worked essential to a finding of future compliance, the investigator will proceed to secure a determination of an employer-employee relationship. Some of the factors to be considered in making such a determination are: the degree of supervision, direction and control over the work performed; who furnishes supplies; the amount and kinds of payments to the owner for the use of shop equipment and supplies; the owner's authority to fix hours of work; who carries the public liability and other insurance; gratuities; and other similar considerations.

Certain individuals are exempt from the definition of "employee" by the statute. Among these are individuals employed by a federal, state or municipal government or political subdivision, and the following:

- (1) Part-Time baby sitters in the home of the employer, or someone who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping.

Prior to January 15, 1972 an exemption was provided for "domestic service in the home of the employer" -- work in or about the domicile of an employer in his capacity as a householder. An amendment effective January 15, 1972 enacted by the 1971 Legislature removed this exemption and substituted the above, thus extending minimum wage coverage for the first time to all domestic workers, except part-time baby sitters and live-in companions to the sick or elderly. Domestic workers are covered under this wage order. A separate manual dated 12/10/71, contains guidelines for enforcement of the minimum wage provisions for domestic workers.

- (2) Labor on a Farm

The term "farm" includes stock, dairy, poultry, fur-bearing animal, fruit, and truck farms, plantations, orchards, nurseries, greenhouses, or other similar structures, used primarily for the raising of agricultural or horticultural commodities.

In accordance with our new policy on required uniforms as outlined in memo to supervisors dated May 25, 1971, employers are responsible for the cost and maintenance of required uniforms for all employees, even where such costs if borne by the employee would not depress the minimum wage. Deductions from wages for the cost or maintenance of required uniforms, or charges for such a purpose in a separate transaction are deemed to be in violation of Section 193 of the Labor Law.

If a uniform is not required either by the employer or by law or regulation, the employer has no responsibility for its supply, or maintenance.

Working Time

Section 142-2.1 (b) of the wage order requires that minimum wages be paid for "time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee."

Example:

Employee reports for work as instructed at 9:00 A.M. No work is provided but he is told to wait. At 10:00 A.M. he is assigned to work. Employee must be paid for the hour from 9 to 10 because he was required to be available for work. During that hour he was "on call".

In othersituations, it will be necessary to distinguish between "on call" and "subject to call" time. In general, when an employee is subject to call, only the hours actually worked are considered to be working time; when an employee is on call, the total hours of work plus required waiting time are considered working time. More specifically --

On call time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for the immediate performance of their assigned duties. They are considered to be working all the hours that they are confined to the workplace.

Subject to call time is that time during which employees are permitted to leave the work room or workplace between work assignments to engage in personal pursuits and activities. In some cases, arrangements are made for employees to be available for assignments by leaving word as to where they can be reached. Sometimes, they may be restricted to a specified area, to be reachable by telephone or otherwise, to report for the work assignment within 15 to 30 minutes, etc. For such persons, working time starts when they are actually ordered to a specific assignment.

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Example:

An ambulance driver for a proprietary hospital works from 6 A.M. to 3 P.M. with one hour for lunch. From 3 P.M. to 7 P.M. he is free to be anywhere on hospital grounds or he may leave the grounds if he can be reached and become available within 30 minutes. From 7 P.M. to 9 P.M. he is required to be available in the emergency room to answer emergency calls.

Working time is as follows:

From 6 A.M. to 3 P.M. (1 hour lunch)	8 hours
From 3 P.M. to 7 P.M. (Subject to call time)	
Working time only if called upon and only for actual time spent working. If not called upon	0 hours
From 7 P.M. to 9 P.M. (on call time)	<u>2 hours</u>
Total working time	10 hours,
plus any time actually worked during "subject to call time".	

The above distinctions have particular significance with regard to a residential employee. The wage order provides that "a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work: (a) during the normal sleeping hours solely because he is required to be on call during such hours, and (b) at any other time when he is free to leave the place of employment."

Normal sleeping hours shall be presumed to be 8 hours a day. Where a variance from 8 hours is claimed, any reasonable agreement of the parties shall be accepted.

Free to leave is that period of time when an employee may engage in private pursuits such as meal periods, shopping, or any other period of complete freedom from his duties, when he may leave the premises for purposes of his own. For this purpose, "premises" is construed to be that place or area in which the employee is required to perform his duties. As shown above, it does not necessarily mean the entire confines of the establishment.

Example:

A resident employee in an undertaking parlor does porter work from 8 A.M. to 5 P.M. with one hour for lunch. From 5 P.M. to 8 P.M. he is free to leave the premises. From 8 P.M. to 8 A.M. he is required to remain on the premises to take phone calls and messages.

Working time is as follows:

From 8 A.M. to 5 P.M. - one hour for lunch	8 hours
From 5 P.M. to 8 P.M. - free time	
From 8 P.M. to 8 A.M. - deducting 8 hours for sleeping time and one hour for dressing, breakfast etc. the balance of "on call" time is	<u>3 hours</u>
Total working time	11 hours

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Some employees, such as ambulance drivers, are required to be on duty for a continuous period of 24 hours or more, and although they are not "residential" employees, they are able to sleep on the employer's premises while on call. In such circumstances, sleeping time may be excluded from working time under the following conditions: (Administrative guidelines)

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.
2. Adequate sleeping facilities are provided.
3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.
4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.
5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

In similar fashion, where the employer and employees agree to exclude bona fide meal periods, such meal period time, up to a maximum of three hours during the 24 hour period, may be excluded from working time.

Waiting Time in Grading Houses

For minimum wage purposes, all waiting time at grading house of one hour or less is considered as working time. Where more than one hour of waiting time is involved, a detailed report is to be submitted for a determination. The report should include such information as the reason for the stoppage of work; the amount of waiting time incurred; a description of the work site as distinguished from the grading house premises or other premises where employees worked; what instructions if any were given to workers as to the time they should report back to work; what limitations, if any, were placed on their leaving the work site; how the employees used the time, etc.

Training programs

In some cases, employers have attempted to set up "pre-employment" training programs claiming the trainees were not employees subject to the minimum wage law. Our counsel has held that generally trainees are deemed individuals "employed or permitted to work by an employer in any occupation" within the framework of Section 651 of the Labor Law.

James McKenna

January 5, 1982
Buffalo

Jack L. Mrozak

Albany

Your Memo November 23, 1981

Question Re: Subject to Call vs. On Call Time

In accordance with our discussion, it is my understanding that the questions posed in the above memorandum do not involve the present investigation conducted at Quality Care.

It is not clear as to the situation involved as the basis for your particular question. Hopefully the following information may be used to clarify the particular question at hand.

In certain instances employees are required to be on duty for a continuous period although they are not "Residential" employees. They are able to sleep on the employer's premises while on call. In such instances, sleeping time may be excluded from working time under the following conditions:

1. The employer and the employee agree to exclude from working time a bona fide regularly scheduled "sleeping period" of not more than 8 hours per day. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.
2. Adequate sleeping facilities are provided.
3. During a given 24 hours on duty the scheduled sleeping period is confined to a specific period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.
4. If the scheduled sleeping period is interrupted by a call to duty the interruption will be considered time worked.
5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Also where the employer and employee agree to exclude bona fide meal periods, such meal period time up to a maximum of 3 hours during the 24 hour period may be excluded from working time.

Please feel free to contact me if you have any further question or require further clarification.

JLM/jd

STATE OF NEW YORK - DEPARTMENT OF LABOR
DIVISION OF LABOR STANDARDS

REMARKS PREPARED FOR DELIVERY BY JOSEPH ARMER, DIRECTOR OF LABOR STANDARDS,
TO NEW YORK STATE ASSOCIATION OF HEALTH CARE PROVIDERS, INC., ROCHESTER, NY,
JANUARY 18, 1983

Thank you for your invitation to speak to the New York State Association of Health Care Providers. As Director of the Division of Labor Standards, I am answerable to the Commissioner of Labor Lillian Roberts for two basic responsibilities. One is to oversee and administer the enforcement of New York State Labor Laws concerning minimum wage, hours of work, child labor, payment of wages and wage supplements, industrial homework, and migrant farm labor. The other, equally important, is to communicate with employers, employees and the public about the Division's role and functions, to educate and inform about the labor law and regulations - and the policies and interpretations which, when consistently and reasonably applied, take on the force of law.

As employers in New York State, all of you are subject to the provisions of the New York State Labor Law. Before I get into the topic of minimum wage, I will outline some of the general requirements which apply to all employers.

Manual workers must be paid wages weekly and not later than seven calendar days after the end of the week in which the wages are earned. Aides providing personal services at the residence of the patient would be considered manual workers. However, a manual worker employed by a non-profitmaking organization may be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly. Clerical employees and executive, administrative or professional employees earning \$300.00 a week or less must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer. No employee, whether clerical, manual, or other worker, may be required as a condition of employment to accept wages at periods other than provided by the law. At the time of hire, the employee must be advised of the regular pay day and subsequently of any changes in the pay days prior to the time of such changes.

No deductions may be made from wages except deductions authorized by law, or which are authorized in writing by the employee and are for the employee's benefit. Authorized deductions include payments for insurance premiums, pension, contributions to charitable organizations, payments for U.S. bonds, union dues, and similar payments for the benefit of the employee.

An employer may not make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages. Examples of illegal deductions or charges include payments by the employee for spillage, breakage, cash shortages or losses, and cost and maintenance of required uniforms.

Every employer must notify employees at the time of hiring of the rate of pay, and with every payment of wages furnish each employee with a statement of wages listing gross wages, deductions and net wages. Upon the request of an employee, the employer must furnish an explanation of how such wages were computed.

Under New York State minimum wage regulations, employers must also indicate on the wage statement the number of hours worked, the rates paid, and allowances, if any, claimed as part of the minimum wage.

Employees must be paid in cash unless the employer receives a permit from the Commissioner of Labor to pay their wages by check. In order to obtain the permit, the employer must show satisfactory proof of financial responsibility; also facilities must exist for employees to cash their checks for the full amount and without difficulty or expense.

The cash payment requirement does not apply to employees working on a farm not connected with a factory; nor to executive, administrative, and professional employees whose earnings are in excess of \$300 weekly.

Employers may also deposit an employee's net wages in a bank or other financial institution but only with the advance written consent of the employee.

An employer is required to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.

While there is no requirement in the law that an employer provide fringe benefits or wage supplements such as vacation, holiday or sick pay or health, welfare and retirement benefits, if an employer agrees to provide such benefits it is a violation of the law to fail to live up to the agreement.

Such agreements may be changed but employees must be notified of the changes in writing or by publicly posting in advance of the change. An employee may not be deprived of benefits already earned and vested under a previous agreement.

No minor fourteen to eighteen may be employed when attendance upon instruction is required by the Education Law. A minor may be employed at times when attendance at school is not required if he or she presents a valid employment certificate. Employment certificates or working papers are issued by local school districts, even during vacation, a copy of the employment certificate must be kept on file by the employer.

Minors under sixteen years of age may not operate washing, grinding, cutting, slicing or mixing machinery.

Minors under sixteen are limited to 3 hours of work on a school day, eight hours on any day when school is not in session, twenty-three hours a week, six days a week. They may not work after 7 in the evening or before seven in the morning. During school vacation 14 and 15 year old minors may work eight hours a day, up to forty hours a week and up to six days a week.

Sixteen year old minors may work four hours on a school day, eight hours on a non-school day, twenty eight hours and six days a week. There is no restriction of the hours sixteen year olds may work during school vacation, nor of hours for seventeen year olds at any time of the year, in the type of occupation we are concerned with here.

Employers are required to permit a noon day meal period of at least 30 minutes and an additional meal period of at least 20 minutes between 5 and 7 p.m. if the employee starts work before noon and works later than seven. Such meal periods must be free of duty. I will get back to meal periods in the discussion of minimum wage.

I would like to point out to you, first, that minimum wage regulations are not uniform for all Health Care Providers.

Proprietary agencies - private, for profit, individuals, partnerships or corporations, like yourselves, are subject to the provisions of Part 142.2 of Title 12 of the Official Compilation of Codes, Rules and Regulations. That is the Minimum Wage Order for Miscellaneous Industries and Occupations.

Non-profitmaking Institutions which have not elected to be exempt from coverage under a minimum wage order are regulated by Subpart 142-3. The provisions for non-profitmaking institutions differ from those for profit-making employers mainly in the definition of employees who must be paid the minimum wage. Excluded from minimum wage requirements in non-profitmaking institutions are students, learners participating in a bona-fide training program, and volunteers, as well as a number of other categories not relevant to this discussion. Non-profitmaking institutions enjoy a higher lodging allowance, have different record-keeping requirements and are allowed to figure the minimum wage on a payroll period, as opposed to weekly, basis.

Part 143 of Title 12 is a regulation which applies to another type of Non-profitmaking Institution - one which has elected the option to pay the statutory wage exclusive of allowances in lieu of wage order coverage. Such an agency has certified to the Commissioner of Labor within 6 months of the day it was organized or hired its first employee, that it intends to exercise this option. Exempt non-profits pay \$3.35 an hour even for hours worked over 40 in a week but may not take credit for meals and lodging provided to the employee.

Although the regulations for personal care service providers are different according to the situations I have outlined, they are all explicit, particularly in defining working time for which the minimum wage must be paid. In all cases, it is the time an employee is "permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee - one who lives on the premises of the employer - shall not be deemed to be permitted to work or required to be available for work: (1) during his normal sleeping hours solely because he is required to be on call during such hours; (2) at any other time when he is free to leave the place of employment."

When this definition was developed in 1960, there were not systems of health care providers as there are today. Residential employees provided services in the home of the employer. Now the employer is distinct from the person to whom the service is provided and the patient's home is a "place prescribed by the employer". We did have a policy, however, for excluding sleeping time from hours worked for the purpose of computing minimum wage for employees required to be on duty for a continuous period of 24 hours or more who, although they are not "residential employees", are able to sleep on the premises while on call. It has been in effect for ambulance drivers and we have extended it to cover employees who provide personal services in the home of the patient. Policies and interpretations are subject to review by the Commissioner of Labor, the Industrial Board of Appeals, and the courts. We cannot guarantee that it will continue to prevail but we have implemented the policy as follows:

✓ Employees who are required to provide 24 hour personal care in the home of the recipient, as specified by the employer, shall be paid the New York State minimum wage for all hours except normal sleeping hours, meal periods and time when the employee is free to leave the place of employment for personal business.

Normal sleeping hours shall be presumed to be 8 hours a day designated by the employer, subject to the following conditions:

(1) During a given 24 hours on duty, the scheduled sleeping period is confined to a specified continuous period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.

(2) Adequate sleeping facilities shall be provided.

(3) If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.

(4) There must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Meal Periods may be excluded up to one hour for each meal and a maximum of three hours in the 24 hour period. If the meal period is not free of duty, even if the employee manages to eat, the hour may not be subtracted from paid time.

The wage order requires payment of \$3.35 an hour for all hours remaining after the aforementioned exclusions have been applied up to 44 hours in a payroll week. Hours worked by residential employees over 44 in that week must be paid at the rate of \$5.02½ an hour. Residential employees generally live on the premises for a tour of duty extending over several consecutive 24 hour periods. Non-residential employees must be paid at the overtime rate for work over 40 hours in a week. When the total weekly wage due has been computed, the employer may deduct \$1.15 for each meal furnished to the employee and \$1.40 per day for lodging. The meals and lodging must meet reasonable standards of adequacy and sanitation. If a uniform is required, it must be furnished by the employer. Time spent washing and otherwise maintaining the uniform should be paid time; otherwise the uniform maintenance allowance must be added to the weekly wage.

Subpart 142.2 provides for a tip allowance, however it can be applied only when the employee is engaged in a particular occupation in which tips have

customarily and usually constituted a part of the employee's remuneration, consequently it would not appear to be relevant to the situations we are discussing.

If the employee reports to the office of the employer to be assigned to work at varying locations, payment for travel time to the home of the patient is not required if the employment understanding clearly is that the pay or time of the employee begins at the home of the patient. This would be true even if the employee may be reassigned to work at the same home for more than one day.

Training time must be paid at the minimum wage rate unless the trainee is a student fulfilling the curriculum requirements of the non-profitmaking institution which he or she attends and is required to obtain supervised vocational experience under the direction of a home care agency. If an employee, who is not a student in a non-profitmaking institution, is participating in a bona fide training program for the occupation in which he or she is employed, the employer may apply to the Department of Labor for a certificate to pay 75% of the applicable minimum wage. The criteria for a bona fide training program are outlined in the wage order.

I have brought with me today a number of copies of the relevant wage order. Each of you is welcome to one, as well as a copy of my prepared remarks.

There are district offices of the Division of Labor Standards in all the regions of the State. The addresses and phone numbers are listed in the materials provided to you.

Albany 12240, State Office Bldg. Campus	(518) 457-2730
Binghamton 13901, 15 Henry Street	(607) 773-7801
Buffalo 14202, 65 Court Street	(716) 847-7147
Hempstead 11550, 175 Fulton Street	(516) 481-6064
New York City 10047, Two World Trade Center	(212) 488-7700
Rochester 14614, 155 South Main Street	(716) 454-3710
White Plains 10603, 30 Glenn Street	(914) 997-9521

Please feel free to call the office nearest you if any questions about the application of the Labor Law come up in the future. If the Association wishes to resolve any issues as a group, I am available to work with you.

Commissioner of Labor Lillian Roberts has asked me, while I am speaking to you today, to bring you up-to-date on recent amendments to the Federal Targeted Jobs Tax Credit Legislation.

First, the program has been extended for two years so that an employer is now eligible to claim the full two years of tax credits allowed for any eligible individual who begins work before January 1, 1985.

Second, the time requirement for filing a written request for the tax credit certification has now been eased by one day. The law now reads that the certification may be requested on or before the day on which the eligible individual begins work (this used to read before the day).

Third, the amendments add a new targeted group "Summer Youth Employee". A summer youth employee "is a young person who is 16 or 17; who first begins work for the employer between May 1 and September 15, and is a member of an economically disadvantaged family. For this target group the employer is eligible to claim a credit on his or her Federal tax return of 85% of the first \$3,000 in wages paid for any 90 day period between May 1 and September 15.

I wanted to bring these changes to your attention because I know that there are a great many of you who are taking advantage of the substantial tax savings provided under the program. For those of you who are still unfamiliar with it, the TJTC Program provides an employer with a Federal tax credit equal to 50% (except for the new Summer Youth Employee Tax Group) of the first \$6,000 in wages paid to each eligible employee during the first year of employment and 25% of the first \$6,000 in wages paid to each eligible employee during the second year of employment.

The eligibility of workers to qualify you for these tax credits is determined by the local offices of the New York State Job Service. For information on how you may take advantage of this program contact your nearest Job Service Local Office, or call 518-457-6823.

DEPARTMENT OF LABOR - INTER-OFFICE MEMORANDUM

Date: February 1, 1984

To: ALL SUPERVISORS

Office: Labor Standards

From: Joseph C. Armer

Office: Labor Standards

Subject: Minimum Wage Status - Home Health Attendants who Reside in the Homes of Medicaid Clients and are Employed by Profit-making or Non-Profit Making Establishments.

Several Home Attendant cases are now before the Industrial Board of Appeals. These cases involve employees of profit-making or non-profit-making establishments who reside in the homes of Medicaid clients for the purpose of providing care and assistance to homebound individuals. The critical issues in these cases appear to be (1) are these employees exempted from Minimum Wage coverage under Section 651.5(a) of the Labor Law; (2) is the employer entitled to credit for sleeping time as non-working time for Minimum Wage purposes; and (3) is the employer entitled to take credit for on-premises meal periods as non-working time.

1. Are these employees exempted from Minimum Wage coverage under Section 651.5(a) of the Labor Law?

651.5(a) - - - employee does not - - - include: - individual - - - "in service as a part-time baby-sitter in the home of the employer; or someone who lives in the home of the employer for the purpose of serving as a companion to a sick, convalescent or elderly person and whose principal duties do not include housekeeping."

To be exempted from Minimum Wage coverage the individuals must serve as a companion to a sick, convalescent or elderly person and must live in the home of the employer. We would consider a sick person as one who is under a doctor's care; a convalescent one who is recovering from a recent illness; and an elderly person, one in his 60's or older and who requires care in getting around in the home. To qualify for the exemption, the principal duties of these persons may not include housekeeping chores. (We would accept 20% housekeeping time for the sick, convalescent or elderly -- NOTE: housekeeping time for other non-eligible family members could void the exemption). We would apply a strict interpretation to the requirement that an exempt employee be someone who lives in the home of the employer. We are supported in our interpretation by a 1969 Decision of the Board of Standards and Appeals - at that time domestics in the home of the employer were exempt from Minimum Wage coverage). Smithfield Services, Inc., a temporary help agency for domestic workers claimed that the domestic workers were employees of its respective clients (householders) to whom they were referred by it and for whom the domestics performed services. Smithfield contended these workers were, therefore, exempt from the pertinent sections of the Minimum Wage Law and Minimum Wage Order. The Board of Standards and Appeals rejected the Smithfield arguments and held that the employees did not perform their services in the home of the petitioner (Smithfield) and were covered by the Minimum Wage Law. The similarities between Smithfield and our home attendant cases are obvious. We will, therefore, not exempt these home attendants from Minimum Wage coverage under Section 651.5(a).

To: All Supervisors

February 1, 1984

2. Is the Employer Entitled to Credit for Sleeping Time as Non-Working time for Minimum Wage Purposes?

The Home Attendants who sleep in the home of the client are not residential employees sleeping in the home of the employer. Rather, they are employees who are permitted to utilize sleeping facilities provided by clients of the employer. The Division of Labor Standards has consistently held that sleeping time for a non-residential employee who is required to be on duty for a continuous period of 24 hours or more may be excluded from working time if the following conditions are met:

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.
2. Adequate sleeping facilities are provided.
3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.
4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.
5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Our limited experience with the home attendant cases indicates that the attendants were engaged with the understanding that they would not be paid for sleeping time. We feel this constitutes tacit agreement; sleeping time, subject to the conditions listed above, is not working time for Minimum Wage purposes.

3. Is the Employer entitled to Take Credit for On-Premises Meal Periods for Employees who are Required to be On Duty for a Continuous Period of 24 Hours or More?


To my knowledge, this question has not progressed to a decision in any Industrial Board of Appeals case. Federal Court Decisions, however, indicate that an employer may require a continuous duty employee to remain on the premises during bona fide meal periods. Accordingly, it is the position of the Division of Labor Standards that bona fide meal periods for employees on duty for 24 hours or more may be excluded from work time up to a maximum of three hours during the 24 hour period.

To: All Supervisors

February 1, 1984

Please share the content of this memorandum with your Labor Standards Investigators and Senior Labor Standards Investigators.

I will keep you advised of any decisions that may be forthcoming from the Industrial Board of Appeals or the Courts.



Joseph C. Armer, Director
Division of Labor Standards

cc: Comm. Maher
Comm. Smith
Assistant Directors
Chiefs

JCA:jm

RECEIVED
DEPARTMENT OF LABOR
ALBANY, N. Y.

FEB 0 1 1984

LABOR STANDARDS
ALBANY CENTRAL OFFICE

STATE OF NEW YORK - DEPARTMENT OF LABOR

REMARKS PREPARED FOR DELIVERY BY JOSEPH ARMER, DIRECTOR OF LABOR STANDARDS,
TO HOME HEALTH CARE INDUSTRY PANEL, 625 DELAWARE AVENUE, BUFFALO, NEW YORK
FEBRUARY 23, 1984

Thank you for your invitation to speak to this Home Health Care Industry Panel. As Director of the Division of Labor Standards, I am answerable to the Commissioner of Labor Lillian Roberts for two basic responsibilities. One is to oversee and administer the enforcement of New York State Labor Laws concerning minimum wage, hours of work, child labor, payment of wages and wage supplements, industrial homework, and migrant farm labor. The other, equally important, is to communicate with employers, employees and the public about the Division's role and functions, to educate and inform about the labor law and regulations - and the policies and interpretations which, when consistently and reasonably applied, take on the force of law.

As employers in New York State, all of you are subject to the provisions of the New York State Labor Law. Before I get into the topic of minimum wage, I will outline some of the general requirements which apply to all employers.

Manual workers must be paid wages weekly and not later than seven calendar days after the end of the week in which the wages are earned. Aides providing personal services at the residence of the patient would be considered manual workers. However, a manual worker employed by a non-profitmaking organization may be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly. Clerical employees and executive, administrative or professional employees earning \$300.00 a week or less must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular pay days designated in advance by the employer. No employee, whether clerical, manual, or other worker, may be required as a condition of employment to accept wages at periods other than provided by the law. At the time of hire, the employee must be advised of the regular pay day and subsequently of any changes in the pay days prior to the time of such changes.

No deductions may be made from wages except deductions authorized by law, or which are authorized in writing by the employee and are for the employee's benefit. Authorized deductions include payments for insurance premiums, pension, contributions to charitable organizations, payments for U.S. bonds, union dues, and similar payments for the benefit of the employee.

An employer may not make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages. Examples of illegal deductions or charges include payments by the employee for spillage, breakage, cash shortages or losses, and cost and maintenance of required uniforms.

Every employer must notify employees at the time of hiring of the rate of pay, and with every payment of wages furnish each employee with a statement of wages listing gross wages, deductions and net wages. Upon the request of an employee, the employer must furnish an explanation of how such wages were computed.

Under New York State minimum wage regulations, employers must also indicate on the wage statement the number of hours worked, the rates paid, and allowances, if any, claimed as part of the minimum wage.

Employees must be paid in cash unless the employer receives a permit from the Commissioner of Labor to pay their wages by check. In order to obtain the permit, the employer must show satisfactory proof of financial responsibility; also facilities must exist for employees to cash their checks for the full amount and without difficulty or expense.

The cash payment requirement does not apply to employees working on a farm not connected with a factory; nor to executive, administrative, and professional employees whose earnings are in excess of \$300 weekly.

Employers may also deposit an employee's net wages in a bank or other financial institution but only with the advance written consent of the employee.

An employer is required to notify employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.

While there is no requirement in the law that an employer provide fringe benefits or wage supplements such as vacation, holiday or sick pay or health, welfare and retirement benefits, if an employer agrees to provide such benefits it is a violation of the law to fail to live up to the agreement.

Such agreements may be changed but employees must be notified of the changes in writing or by publicly posting in advance of the change. An employee may not be deprived of benefits already earned and vested under a previous agreement.

No minor fourteen to eighteen may be employed when attendance upon instruction is required by the Education Law. A minor may be employed at times when attendance at school is not required if he or she presents a valid employment certificate. Employment certificates or working papers are issued by local school districts, even during vacation, a copy of the employment certificate must be kept on file by the employer.

Minors under sixteen years of age may not operate washing, grinding, cutting, slicing or mixing machinery.

Minors under sixteen are limited to 3 hours of work on a school day, eight hours on any day when school is not in session, twenty-three hours a week, six days a week. They may not work after 7 in the evening or before seven in the morning. During school vacation 14 and 15 year old minors may work eight hours a day, up to forty hours a week and up to six days a week.

Sixteen year old minors may work four hours on a school day, eight hours on a non-school day, twenty eight hours and six days a week. There is no restriction of the hours sixteen year olds may work during school vacation, nor of hours for seventeen year olds at any time of the year, in the type of occupation we are concerned with here.

Employers are required to permit a noon day meal period of at least 30 minutes and an additional meal period of at least 20 minutes between 5 and 7 p.m. if the employee starts work before noon and works later than seven. Such meal periods must be free of duty. I will get back to meal periods in the discussion of minimum wage.

I would like to point out to you, first, that minimum wage regulations are not uniform for all Health Care Providers.

Proprietary agencies - private, for profit, individuals, partnerships or corporations, like yourselves, are subject to the provisions of Part 142.2 of Title 12 of the Official Compilation of Codes, Rules and Regulations. That is the Minimum Wage Order for Miscellaneous Industries and Occupations.

Non-profitmaking Institutions which have not elected to be exempt from coverage under a minimum wage order are regulated by Subpart 142-3. The provisions for non-profitmaking institutions differ from those for profit-making employers mainly in the definition of employees who must be paid the minimum wage. Excluded from minimum wage requirements in non-profitmaking institutions are students, learners participating in a bona-fide training program, and volunteers, as well as a number of other categories not relevant to this discussion. Non-profitmaking institutions enjoy a higher lodging allowance, have different record-keeping requirements and are allowed to figure the minimum wage on a payroll period, as opposed to weekly, basis.

Part 143 of Title 12 is a regulation which applies to another type of Non-profitmaking Institution - one which has elected the option to pay the statutory wage exclusive of allowances in lieu of wage order coverage. Such an agency has certified to the Commissioner of Labor within 6 months of the day it was organized or hired its first employee, that it intends to exercise this option. Exempt non-profits pay \$3.35 an hour even for hours worked over 40 in a week but may not take credit for meals and lodging provided to the employee.

Although the regulations for personal care service providers are different according to the situations I have outlined, they are all explicit, particularly in defining working time for which the minimum wage must be paid. In all cases, it is the time an employee is "permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee - one who lives on the premises of the employer - shall not be deemed to be permitted to work or required to be available for work: (1) during his normal sleeping hours solely because he is required to be on call during such hours; (2) at any other time when he is free to leave the place of employment."

When this definition was developed in 1960, there were not systems of health care providers as there are today. Residential employees provided services in the home of the employer. Now the employer is distinct from the person to whom the service is provided and the patient's home is a "place prescribed by the employer". We did have a policy, however, for excluding sleeping time from hours worked for the purpose of computing minimum wage for employees required to be on duty for a continuous period of 24 hours or more who, although they are not "residential employees", are able to sleep on the premises while on call. It has been in effect for ambulance drivers and we have extended it to cover employees who provide personal services in the home of the patient. Policies and interpretations are subject to review by the Commissioner of Labor, the Industrial Board of Appeals, and the courts. We cannot guarantee that it will continue to prevail but we have implemented the policy as follows:

Employees who are required to provide 24 hour personal care in the home of the recipient, as specified by the employer, shall be paid the New York State minimum wage for all hours except normal sleeping hours, meal periods and time when the employee is free to leave the place of employment for personal business.

Normal sleeping hours shall be presumed to be 8 hours a day designated by the employer, subject to the following conditions:

- (1) During a given 24 hours on duty, the scheduled sleeping period is confined to a specified continuous period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.
- (2) Adequate sleeping facilities shall be provided.
- (3) If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.
- (4) There must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Meal Periods may be excluded up to one hour for each meal and a maximum of three hours in the 24 hour period. If the meal period is not free of duty, even if the employee manages to eat, the hour may not be subtracted from paid time.

The wage order requires payment of \$3.35 an hour for all hours remaining after the aforementioned exclusions have been applied up to 44 hours in a payroll week. Hours worked by residential employees over 44 in that week must be paid at the rate of \$5.02½ an hour. Residential employees generally live on the premises for a tour of duty extending over several consecutive 24 hour periods. Non-residential employees must be paid at the overtime rate for work over 40 hours in a week. When the total weekly wage due has been computed, the employer may deduct \$1.15 for each meal furnished to the employee and \$1.40 per day for lodging. The meals and lodging must meet reasonable standards of adequacy and sanitation. If a uniform is required, it must be furnished by the employer. Time spent washing and otherwise maintaining the uniform should be paid time; otherwise the uniform maintenance allowance must be added to the weekly wage.

Subpart 142.2 provides for a tip allowance, however it can be applied only when the employee is engaged in a particular occupation in which tips have

customarily and usually constituted a part of the employee's remuneration, consequently it would not appear to be relevant to the situations we are discussing.

If the employee reports to the office of the employer to be assigned to work at varying locations, payment for travel time to the home of the patient is not required if the employment understanding clearly is that the pay or time of the employee begins at the home of the patient. This would be true even if the employee may be reassigned to work at the same home for more than one day.

Training time must be paid at the minimum wage rate unless the trainee is a student fulfilling the curriculum requirements of the non-profitmaking institution which he or she attends and is required to obtain supervised vocational experience under the direction of a home care agency. If an employee, who is not a student in a non-profitmaking institution, is participating in a bona fide training program for the occupation in which he or she is employed, the employer may apply to the Department of Labor for a certificate to pay 75% of the applicable minimum wage. The criteria for a bona fide training program are outlined in the wage order.

I have brought with me today a number of copies of the relevant wage order. Each of you is welcome to one, as well as a copy of my prepared remarks.

There are district offices of the Division of Labor Standards in all the regions of the State. The addresses and phone numbers are listed in the materials provided to you.

Albany 12240, State Office Bldg. Campus	(518) 457-2730
Binghamton 13901, 15 Henry Street	(607) 773-7801
Buffalo 14202, 65 Court Street	(716) 847-7147
Hempstead 11550, 175 Fulton Street	(516) 481-6064
New York City 10047, Two World Trade Center	(212) 488-7700
Rochester 14614, 155 South Main Street	(716) 454-3710
White Plains 10603, 30 Glenn Street	(914) 997-9521

RJP

January 29, 1985

Ms. Jo-Anne Gettings, RN
Home Care Services Director
Chautauqua Opportunities, Inc.,
Aging Services Division
188 S. Erie Street
Mayville, New York 14757

Dear Ms. Gettings:

Employees of a non-profit or profit-making corporation who provide home care services are protected by the provisions of the New York State Minimum Wage Law. Most of these employees are covered by the Minimum Wage Order for Miscellaneous Industries and Occupations (copy enclosed). Some non-profit corporations have elected to be exempt from wage order coverage. The employees of these agencies are protected by the Commissioner's regulations for non-profit establishments electing to be exempt from wage order coverage. (A copy of these regulations is also enclosed.)

Employees of an agency who sleep at the home of the client are not sleeping in the home of the employer. The Division of Labor Standards does, however, as a matter of policy, accept sleeping at the work site as meeting substantial compliance with the exception in the wage order and regulations for sleeping time. Accordingly, undisturbed sleeping time during regular sleeping hours of up to eight hours is not considered working time. Additionally, meal periods free from duty of up to one hour are not considered to be working time even though the employee remains on the premises of the client. In addition, regularly scheduled off-duty time for a sleep-in employee is not considered to be working time, whether or not the employee actually leaves the premises while off duty.

A typical situation might involve eight hours of undisturbed sleeping time, three one-hour meal periods, and no time available to leave the premises. This would result in a thirteen-hour working day for minimum wage purposes.

I hope this information is helpful to you.

Sincerely,

Joseph C. Arner

RECEIVED
DEPARTMENT OF LABOR
ALBANY, N. Y.

FEB 0 1 1985

LABOR STANDARDS
ALBANY CENTRAL OFFICE

JCA:jm

bcc - MROZOL
MCKENNA

GUIDELINES
FOR
APPLICATION OF THE
NEW YORK STATE MINIMUM WAGE
TO THE
EMPLOYMENT OF INDIVIDUALS
PROVIDING HEALTH AND PERSONAL CARE
IN THE HOME OF A SICK, DISABLED,
CONVALESCING OR ELDERLY PERSON

GENERAL

Every employer shall pay to each of his employees for each hour worked a wage of not less than \$3.35.

"Employer" includes any individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons acting as employer.

"Employee" includes any individual employed or permitted to work by an employer, but shall not include:

- (1) any individual who is employed or permitted to work by a federal, state or municipal government or political subdivision thereof.
- (2) any individual permitted to work in an executive, administrative or professional capacity.
- (3) any individual who lives in the home of an employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping.

(For this exemption to apply the employer is either the patient or a member of the same household as the patient.

In some cases, an attorney, accountant or trust officer may act as an agent of, or in behalf of the patient in

maintaining required insurance coverage and payroll records,

Performance of the following services shall not be considered "housekeeping":

preparing and serving meals according to instructions
making and changing beds
dusting and vacuuming the rooms the patient uses
dishwashing
tidying kitchen
tidying bedroom
tidying bathroom
listing needed supplies
shopping for patient if no other arrangement possible
patient's personal laundry if no family member available or
able to do this; this may include necessary ironing and mending.

(4) additional exceptions are noted under not-for-profit agencies

HOURS WORKED

The minimum wage shall be paid for the time an employee is permitted to work or is required to be available for work at a place prescribed by the employer and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. In some cases, time spent in training is subject to payment of minimum wage. This requirement will be discussed under a separate heading.

When the care provider lives on the employer's premises, he or she shall not be deemed to be permitted to work or required to be available for work (1) during his or her normal sleeping hours solely because he or she is required to be on call during such hours; (2) at any other time when he or she is free to leave the place of employment.

When the employer is other than the patient or a member of the patient's household, there is an administrative policy for excluding sleeping time and meal periods from the working time of individuals who are required to be on duty for a continuous period of 24 hours or more and are able to sleep on the premises while on call.

Such individuals shall be paid the New York State minimum wage for all hours except normal sleeping hours, meal periods and time when the employee is free to leave the place of employment for personal business.

Normal sleeping hours shall be presumed to be 8 hours a day designated by the employer, subject to the following conditions:

- (1) During a given 24 hours on duty, the scheduled sleeping period is confined to a specified continuous period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period will not be excluded from working time.
- (2) Adequate sleeping facilities shall be provided.
- (3) If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.
- (4) There must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Meal periods may be excluded up to one hour for each meal and a maximum of three hours in the 24 hour period. If the meal period is not free of duty, even if the employee manages to eat, the hour may not be subtracted from paid time.

TRAVEL TIME

If the employee reports to the office of an employer to be assigned to work at varying locations, travel time to the home of the patient is not considered working time if there is a clear agreement between employer and employee that paid time begins at the home of the patient.

WAGE ORDER REQUIREMENTS

Any one of three sets of regulations under the Minimum Wage Act may apply to the employment of health and personal care employees. They are:

Minimum Wage Order for Miscellaneous Industries and Occupations

Subpart 142-2, Title 12, OCCRR (Provisions Applicable to All Employees

Except Employees in Non-Profitmaking Institutions Covered by the Provisions

of Subpart 142-3 or Employees of a Non-Profitmaking Institution Which Has Elected to be Exempt from Coverage Under a Minimum Wage Order.)

Subpart 142-3, Title 12 OCCRR (Provisions Applicable to Employees in Non-Profitmaking Institutions Which Have Not Elected to be Exempt From Coverage Under a Minimum Wage Order.)

Part 143, Title 12 OCCRR (Minimum Wage Requirements Applicable to Non-Profitmaking Institutions Which Have Elected the Option to Pay the Statutory Wage Exclusive of Allowances.)

The provisions of these regulations vary with respect to payment of overtime, credit for meals and lodging provided by the employer, maintenance of required uniforms and the definition of employees who must be paid the minimum wage.

MISCELLANEOUS WAGE ORDER
SUBPART 142-2

APPLIES TO: Employers who are private individuals and proprietary, (profitmaking) organizations or agencies.

OVERTIME: One and a half times the basic minimum hourly rate before allowances for meals and lodging. It shall be applied each week for working time over 40 hours.

In cases where individual employees have some degree of permanence to their assignment, adequate sleeping facilities, and facilities to store their personal belongings the overtime rate may be applied for working time over 44 hours in each week. An employee who moved into the home with the expectation of staying for the duration of the case would meet this test.

MEAL AND LODGING

ALLOWANCE: After the total gross weekly wage, including overtime, if any, has been computed, the employer may deduct \$1.15 for each meal furnished to the employee and \$1.40 per day for lodging. The meals and lodging must meet reasonable standards of adequacy and sanitation.

UNIFORM

ALLOWANCE: If a uniform is required its cost may not depress the minimum wage in the week that it was purchased. Where an employee is paid no more than the minimum wage the employer must furnish the uniform or reimburse the employee for its purchase. This requirement applies to any uniform purchase by the employee at the request of the employer during the term of employment or as a condition of employment.

The employer must either add the uniform allowance to the weekly minimum wage or permit the employee to wash and otherwise maintain the uniform during paid working time.

The uniform allowance is:

<u>Per Week</u>	<u>Hours Worked</u>
\$4.20	More than 30
\$3.25	More than 20 to 30
\$2.00	20 hours or less

TRAINING TIME

Training time is working time subject to minimum wage, whether in classroom or on-the-job. An employer may apply for a certificate to pay not less than 75 per cent of the applicable minimum wage to a person participating in a bona fide training program of at least two weeks but no more than ten weeks.

A student is not deemed to be working or to be permitted to work if, in order to fulfill the curriculum requirements of the non-profitmaking institution which he or she attends, he or she is required to obtain supervised and directed vocational experience in another establishment.

MISCELLANEOUS WAGE ORDER
SUBPART 142-3

APPLIES TO: Employers who are non-profitmaking institutions operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

EXCEPTIONS FROM MINIMUM WAGE COVERAGE:

Volunteers - persons who work under no contract of hire, express or implied, and with no promise of compensation, other than reimbursement for expenses.

Learners - persons in a non-profitmaking institution participating in a bonafide training program for an occupation in which they are employed, the required training period for which is recognized to be at least two weeks.

Students - individuals enrolled in and regularly attending during the daytime a course of instruction leading to a degree, certificate or diploma, offered at an institution of learning.

OVERTIME: Same as Section 142-2 above

MEAL AND LODGING

ALLCOWANCE: Meals - \$1.15 per meal

Lodging - \$2.00 per day

UNIFORM: Same as Section 142-2 above

TRAINING TIME

Learners and students are not "employees" under minimum wage provisions of Labor Law.

NON-PROFIT EXEMPT
PART 143

APPLIES TO: Employers who are non-profitmaking institutions operated exclusively for religious, charitable or educational purposes, and who have elected the option to pay the statutory wage exclusive of allowances in lieu of wage order coverage. Such an agency has certified to the Commissioner of Labor within 6 months of the day it was organized or hired its first employee, that it intends to exercise this option.

EXCEPTIONS FROM MINIMUM WAGE COVERAGE: SAME AS PART 142-3
OVERTIME: Does not apply under Part 143. Minimum wage is \$3.35

an hour for all working time in a pay period.

MEAL AND LODGING

ALLOWANCE: Does not apply. Employer may not take credit for meals and lodging provided to the employee.

UNIFORM ALLOWANCE:

Does not apply.

TRAINING TIME:

Same as Section 142-3 above.

EMPLOYER/EMPLOYEE RELATIONSHIP

Persons providing health or personal care to patients in their homes are "employees" rather than "independent contractors" except for individuals who have a contract with a local social service district as provided in New York State Social Service Department regulation 505.14 (c)(2)(v) and 505.14 (c)(2)(vi).

STATE OF NEW YORK
DEPARTMENT OF LABOR
Governor W. Averell Harriman
State Office Building Campus
Albany, New York 12240



October 27, 1998

JAMES J. MCGOWAN
Commissioner of Labor

Ms. Marian J. Massie
253 Glenwood Avenue
Syracuse, New York 13207

Dear Ms. Massie:

This is in response to your letter of August 24, 1998, forwarded to me by State Senator John A. DeFrancisco concerning your employment by Options for Independent Living.

The Minimum Wage Order for Miscellaneous Industries and Occupations, a set of regulations governing the field in which you are employed, states that

"a residential employee – one who lives on the premises of the employer – shall not be deemed to be permitted to work or required to be available for work . . . during his normal sleeping hours solely because he is required to be on call during such hours . . ."

This means that, generally, for residential employees, sleep time is not considered working time. "Normal sleeping hours" is presumed to be eight hours a day.

With regard to "live-in" home health aides; (including those workers employed on-site for 24-hour shifts), it is the policy of the Department of Labor that such persons must be paid for no less than 13 hours of each 24-hour day they are required to remain "on call" in the home of the person receiving their services – provided that they are afforded eight hours for sleep and actually receive five hours of uninterrupted sleep and that they are afforded three hours for meals. If a "live-in" home health aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable, and the home health aide must be paid for all eight hours in question. Similarly, if a "live-in" home health aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

cc: J. Mrozak ✓
H. Aloisi
J. Jakubowski
E. Davidow -



In order for us to investigate the specific circumstances of your employment and make a determination as to whether the amount of compensation you receive represents a violation of law, I have requested Supervising Labor Standards Investigator Joseph V. Jakubowski, New York State Department of Labor, Division of Labor Standards, 333 East Washington Street, Syracuse, New York 13202, telephone (315) 428-4642, to contact you for the purpose of obtaining additional information.

I trust this course of action will address your concerns.

Sincerely,


James J. McGowan
Commissioner of Labor

cc: Senator John A. DeFrancisco
Joseph Jakubowski



STATE OF NEW YORK
DEPARTMENT OF LABOR
Counsel's Office
345 Hudson Street – Room 8001
New York, New York 10014-0673

June 25, 2002

Leon Greenberg, P.C.
225 Broadway, Suite 612
New York, New York 10007

Re: Request for Opinion
29 CFR §§ 785.21 & 785.22
Hours Worked by Sleep-In
Home Health Care Attendant

Dear Mr. Greenberg:

Your June 14, 2002 letter asks how the Department of Labor computes the hours worked for minimum wage and overtime purposes by your client, a sleep-in home health care attendant. Your client's duty was to care for all of the needs of an individual in his or her home for two or more consecutive 24-hour periods. She was required to remain in the individual's home at all times during her assignment and had to be available at all times to assist the individual with his or her needs. She was allowed to sleep, but her sleep was frequently interrupted by the need to respond to the individual's needs. She was paid at the rate of \$70.00 per day.

You refer in your letter to 29 CFR §§ 785.21 and 785.22, which address the issue of hours worked by employees who are permitted to sleep while on duty. Section 785.22, which addresses situations where an employee is required to be on duty for 24 hours or more, applies to your client's situation. That regulation provides that an employer and an employee may agree to exclude bona fide sleeping time of up to eight hours from hours worked, provided that the employer furnishes adequate sleeping facilities and the employee can usually enjoy an uninterrupted night's sleep. It provides, however, that, in the absence of such an agreement, all hours of sleeping time constitute hours worked. It further provides that, if sleeping time is interrupted by a call to duty, the interruption must be counted as hours worked, and that, if the employee cannot get a reasonable night's sleep (*i.e.*, five hours), all hours are counted as hours worked. The New York State Department of Labor follows the principles set forth in this regulation in computing the hours worked by a sleep-in home health care attendant such as your client under New York minimum wage and overtime law (Labor Law, Article 19, Section 652, and 12 NYCRR § 142-2.2).

I trust that the foregoing is responsive to your inquiry. If you have any further questions, you may contact me at (212) 352-6655.

Very truly yours,

Robert Ambaras

Robert Ambaras
Associate Attorney

ALBANY CENTRAL OFFICE
DIV OF LABOR STANDARDS

H. Alarsi

T. Glubiate

B. Simonetti

M. Burkard

E. Davidow

D. Frano

C. Zuberato

December 22, 2017

Via electronic mail

Roberta Reardon, Commissioner
New York State Department of Labor
Harriman State Office Campus
Building 12, Room 500, Albany NY 12240
Roberta.Reardon@labor.ny.gov

Re: Home Care Aide Hours Worked - Emergency Rulemaking (LAB-43-17-00002-E)

Dear Commissioner Reardon:

As the Director of the Division of Long Term Care, I am submitting this letter on behalf of the New York State Department of Health's Office of Health Insurance Programs. I am responsible for policy and program oversight related to Medicaid funded home care services, primarily as provided through managed long term care ("MLTC") plans.

Personal care services are provided by aides who assist Medicaid recipients with bathing, toileting, walking and other activities of daily living, as well as any needed housekeeping chores necessary for maintaining the recipients' safety in their home or a community-based setting. In recent years, DOH has helped transition thousands of nursing home residents back to their homes or another community-based setting. The transition from institutional to community-based care is essential to the State's efforts to comply with the Americans with Disabilities Act and the Supreme Court's decision in *Olmstead v. L. C. by Zimring*, 527 U.S. 581 (1999). Many or most of these transitions have only been possible because of the availability of personal care services, including 24-hour live-in personal care services. Without these services, recipients would be unable to tend to their basic daily needs and would need to be transitioned back to an institution for health and safety reasons.

It is DOH's understanding, based on conversations with DOL, that moving from a compensation arrangement based on at least 13 hours per day to one that is based on 24 hours per day would significantly increase labor costs for 24-hour live-in personal care aide services. A significant shortage in the availability of home care agencies to provide personal care services would endanger the health and safety of those receiving the services who no longer have a personal care aide.

On July 14, 2017, in response to requests from across the home care industry and interested stakeholders, along with input from DOL, DOH issued the attached guidance recognizing the

potential for disruption to home care services and reconfirming provider obligations to continue staffing and covering live-in cases.

Since the issuance of this guidance, the impact of the recent court rulings that formed the impetus for DOL's emergency regulation has become clearer. Continued input from MLTC plans, homecare agencies, individual Medicaid recipients, consumer advocates, and other groups has only reconfirmed DOH's concerns about the availability and continuity of personal care services, and 24-hour live-in personal care services in particular.

For this reason, DOH agrees with DOL's conclusion that the issuance of these regulations was necessary for the preservation of the public health, safety or general welfare and that compliance with the normal administrative process would be contrary to the public interest.

Sincerely,

A handwritten signature in black ink that reads "Andrew Segal". The signature is written in a cursive, flowing style.

Andrew Segal, Director
Division of Long Term Care
Office of Health Insurance Programs

Enclosure



July 14, 2017

Services for Live-in Home Care

On April 11, 2017, in *Tokhtaman v. Human Care, LLC*, 2017 N.Y. App. Div. LEXIS 2703, 2017 NY Slip Op 02759 (1st Dept. 2017), the New York State Appellate Division, First Department, held that a home care services aide may be entitled to compensation for the hours she worked in excess of 13 hours a day if she can demonstrate that she is a “nonresidential” employee.

The court declined to determine whether Plaintiff—who alleged that she “generally worked approximately 168 hours per week” as a home care services aide—was in fact a residential or nonresidential employee. Rather, the court indicated that it could not make such a determination, prior to discovery, as a matter of law.

While *Tokhtaman* represents the first significant opinion from the Appellate Division on this issue, several related Supreme Court (trial level) opinions from different venues have been released in recent years.¹ These cases have addressed the issue from similar and differing factual contexts, and have come to a range of conclusions, at least one of which is currently on appeal. The Departments of Health (DOH) and Labor (DOL) have been monitoring these cases, and will continue to evaluate whether action may be needed to prevent unnecessary disruption to home care services in New York State.

However, pending a final resolution of this matter by the courts, or until notice is otherwise given, DOH and DOL expect providers to continue staffing and covering live-in cases in accordance with current Managed Care contracts, Medicaid agreements, MLTC Policy 14.08, and all applicable labor requirements. Live-in cases should not be converted to 24-hour continuous split-shift care unless the individual meets the criteria for this higher level of care.

¹ *Moreno v. Future Care Health Servs., Inc.*, 2015 NY Slip Op 31752(U), ¶¶ 7-8 (Sup. Ct.); *Lai Chan v. Chinese-Am. Planning Council Home Attendant Program, Inc.*, 2015 NY Slip Op 25308, ¶ 6, 50 Misc. 3d 201, 215, 21 N.Y.S.3d 814, 828 (Sup. Ct.); *Andryeyeva v. N.Y. Health Care, Inc.*, 2014 NY Slip Op 24269, ¶ 4, 45 Misc. 3d 820, 827-28, 994 N.Y.S.2d 278, 285-86 (Sup. Ct.).

Exhibit 5

New York Department of Labor Stipulation of Settlement with Chinese- American Planning Council Home Attendant Program

May, 2014



New York State Department of Labor
Andrew M. Cuomo, Governor
Peter M. Rivera, Commissioner

STIPULATION OF SETTLEMENT

WHEREAS, on or around August 20, 2013 through March 26, 2014, the New York State Department of Labor ("NYSDOL") investigated the following person(s) and/or business entity(ies), collectively referred to hereafter as "the Employer:" ~~LING MA~~, CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM INC.; and

WHEREAS, the NYSDOL has found that the Employer was in violation of the following statutes and regulations, among others: Labor Law § 191.1a and §195.1; and

WHEREAS, the NYSDOL has issued Notices of Labor Law Violations and Recapitulation Sheets, copies of which are attached hereto, to the Employer; and

WHEREAS, the NYSDOL has determined that the Employer has failed to pay a total of \$2,044,435.30 in wages and/or wage benefits and/or tip appropriations to current and/or former employees for the collective period from August 25, 2007 to December 27, 2013 as set forth in the attached Recapitulation Sheets; and

WHEREAS, the NYSDOL has assessed an additional amount of \$511,108.83 in liquidated damages pursuant to Labor Law § 663(2); and

WHEREAS, the NYSDOL has found that the Employer was in violation of frequency of wage payment and pay rate notice requirements, as set out in Labor Law § 191.1a and §195.1 and has assessed civil penalties in the amount of \$1000.00 for each of these violations, totaling \$2,000.00; and

WHEREAS, the Employer and the NYSDOL mutually desire to fully resolve and settle the investigation of the Employer and to avoid the time, expense and inconvenience of litigation and therefore have entered into this Stipulation of Settlement ("Stipulation") to settle the claims for unpaid wages;

IT IS HEREBY AGREED:

1. The Employer will pay a total \$2,044,435.30 in wages and/or wage benefits referred to as the "Restitution Amount." The Employer already remitted payment of \$600,000.00, and the balance of \$1,444,435.30 will be made as follows:

Tel: (518) 457-4380, Fax: (518) 485-1819
W. Averell Harriman State Office Campus, Bldg. 12, Room 509, Albany, NY 12240

PAYMENT	DUE DATE
1. \$240,740.30	May 30, 2014
2. \$240,739.00	June 30, 2014
3. \$240,739.00	July 30, 2014
4. \$240,739.00	August 30, 2014
5. \$240,739.00	September 30, 2014
6. \$240,739.00	October 30, 2014

Each payment will be paid by certified check, bank check, or money order, payable to the Commissioner of Labor and sent to:

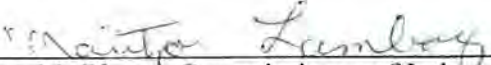
The New York State Department of Labor
75 Varick Street; 7th Floor
New York, NY 10013
Attention: Maritza Lamboy

2. The Employer and each individual and business entity comprising the Employer shall execute an Affidavit of Confession of Judgment in the Restitution Amount simultaneously with the execution of this Stipulation. Upon the NYSDOL's receipt of all payments set forth above, said Affidavits of Confession of Judgment will become null and void.
3. The NYSDOL will make payments to the individuals listed on the Recapitulation Sheets attached to the Agreement in the amounts set forth therein.
4. This Stipulation is intended as settlement only of the wages and/or wage benefits found to be due to the employees set forth in the attached Recapitulation Sheets for the time periods set forth therein. NYSDOL states that it will not issue future assessments against the Employer for unpaid wages and/or wage benefits due to any of the employees included in the Recapitulation Sheets for the periods covered therein, but reserves the right to investigate any claims of wages and/or wage benefits due to: other employees during any time period; or, the employees set forth in the attached Recapitulation Sheets for time periods other than those set forth therein.
5. The Employer shall be in default of this Stipulation if the Employer fails to make any payment as set forth in Paragraph One above within ten days of the date such payment is due. If the Employer fails to deliver payment, the NYSDOL may, without

further notice, enter with the Clerk of the appropriate County(ies) any or all of the aforementioned Affidavits of Confession of Judgment, giving credit for any monies already paid.

6. The Parties agree that this Stipulation shall serve as final settlement of this matter and that no Party shall seek or take further review, action, redress or appeal of or regarding such matter in or before the New York State Industrial Board of Appeals or any other court or forum except as may be necessary to enforce the terms of this Stipulation.
7. If any term, provision, covenant or restriction contained in this Stipulation, or any part thereof, is held by a court of competent jurisdiction or any foreign, federal, state, county or local government or any other governmental regulatory or administrative agency or authority or arbitration panel to be invalid, void, unenforceable or against public policy for any reason, the remainder of the terms, provisions, covenants and restrictions contained in this Agreement shall remain in full force and effect.
8. The foregoing terms constitute the full and complete agreement among/between the NYSDOL and the Employer and no other promise, stipulation or agreement has been made by or between them, verbally or in writing.
9. IN WITNESS WHEREOF, this Stipulation is made in duplicate and the parties have affixed their signatures hereto:

Dated: May 9, 2014


Peter M. Rivera, Commissioner of Labor
by: Maritza Lamboy, Labor Standards Division Assistant
Director
New York State Department of Labor
Division of Labor Standards
75 Varick Street, 7th Floor
New York, New York 10013

Dated: May 9, 2014

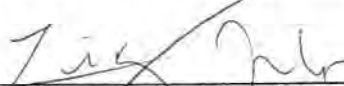

LING MA, Program Director of CHINESE-AMERICAN
PLANNING COUNCIL HOME ATTENDANT
PROGRAM INC

Exhibit 6

Claim Letter to New York State Department of Labor Regarding CPCHAP

July 30, 2019

July 30, 2019

Blaine (Fin) V. Fogg
President

BY EMAIL: Labor.sm.LSClaim.Intake@labor.ny.gov

Janet E. Sabel
*Attorney-in-Chief
Chief Executive Officer*

New York State Department of Labor
Division of Labor Standards
State Campus, Building 12
Albany, NY 12240

Aдриene L. Holder
*Attorney-in-Charge
Civil Practice*

**Re: Claims of Unpaid Wages, Overtime and Spread of Hours Against
Chinese-American Planning Council Home Attendant Program, Inc.**

To Whom This May Concern:

The Legal Aid Society represents the following workers, all of whom are or were employed by Chinese-American Planning Council Home Attendant Program, Inc. ("CPC"):

- (1) Lai Yee Chan,
- (2) Hui Ling Chen,
- (3) Su Zhen Chen,
- (4) Zhu Qin Chen,
- (5) Rui Ling Huang,
- (6) Yan Lian Huang,
- (7) Yan Qin Huang,
- (8) Li Yan Li,
- (9) Mei Fang Li,
- (10) Yu Yan Mei,
- (11) Rui Xiang Pan,
- (12) Ya Huan Tan,
- (13) Sau Lin Wong,
- (14) Xue Rou Xie,
- (15) Yue Fang Chan Yang,
- (16) Xiao Huan Yu,
- (17) Anna Zhang,
- (18) Qiao Yan Zhang,
- (19) Xiao Wen Zhen, and
- (20) Cui Chan Zhu.

All of the claimants worked multiple, consecutive, 24-hour shifts per week for which they were paid only 13 hours per shift despite having consistent nighttime duties that prevented them from obtaining five hours of continuous and uninterrupted sleep and three hours of meal breaks per shift. They now submit wage claims seeking unpaid wages, overtime, spread of hours pay, liquidated damages, and other

damages related to CPC's failure to provide full and accurate paystubs in accordance with the Minimum Wage Order for Miscellaneous Industries and Occupations and the New York Labor Law.

Lai Yee Chan

Ms. Chan began working for CPC in 2007. From 2009 until December 2017, Ms. Chan cared for a patient who was in his eighties and suffered from Alzheimer's/dementia, prostrate problems (which eventually became prostrate cancer), was partially paralyzed, was bedbound and required the assistance of breathing equipment. At least five times per night, Ms. Chan was required to assist her patient with toileting, including changing her patient's diaper and helping him to use the bathroom. Ms. Chan's patient also had difficulty swallowing, and would frequently call out to her at night in panic asking for help. From 2009 until December 2014, Ms. Chan alternated between three and four consecutive, 24-hour shifts per week. In December 2014, Ms. Chan's patient was finally authorized to receive split-shift care. As a result, from December 2014 until December 2017, Ms. Chan cared for her patient only during night shifts (from 8pm to 8am), four days per week.

In December 2017, Ms. Chan was assigned to care for a different patient who was also half paralyzed. Ms. Chan worked two, consecutive 24-hour shifts. Although the patient's care plan did not mandate it, Ms. Chan turned and repositioned her patient's body every two hours to prevent the patient from developing bedsores.¹ Ms. Chan also assisted her patient to use the bathroom approximately five times per night. In January 2018, Ms. Chan submitted a request to be paid for her night work. Despite the request, Ms. Chan was not paid. In fact, Ms. Chan was told by CPC to discontinue care after 9pm. She was further told that she should simply call 911 if the patient developed any serious nighttime issues. Ms. Chan's patient was also told that if she continued to request help at night, CPC would have no choice but to send her to a nursing home. Ms. Chan refused to follow the instructions given her by CPC and continued to provide nighttime care to her patient and to submit requests for night pay. In or about the middle of January, Ms. Chan was fired by CPC.

In February 2018, after Ms. Chan filed a complaint with her union, CPC re-hired her. From February 2018 to April 2018, Ms. Chan worked three, 12-hour shifts per week. Since April 2018, Ms. Chan has been working four, 12-hour shifts per week.

Hui Ling Chen

Ms. Chen was hired by CPC in 1998. From January 2009 until July 2015, Ms. Chen worked four, 24-hour shifts per week – caring for one patient two, consecutive days and a second patient two, consecutive days. Both patients were paralyzed, bedbound, and suffered from Alzheimer's/dementia. The care plans for both patients required Ms. Chen to turn and reposition the patients every two hours. Ms. Chen also changed her patients' diapers between three times per night – one patient at 12am, 2am, and 4am and the second patient at 11:45pm, 2:45am, and 5:30am. In August 2015, Ms. Chen stopped caring for both patients. Since that time, she has focused on only patient, working three consecutive, 24-hour shifts per week.

¹ Additionally, at her mandatory, yearly training, Ms. Chan, along with all of CPC's other home attendant employees, was directed by the nurse in charge to turn and reposition bedbound patients every two hours.

Su Zhen Chen

Ms. Chen was hired by CPC in 1999. From the time she was hired until August 2015, Ms. Chen cared for a woman who suffered from Alzheimer's/dementia, Parkinson's, diabetes, and high blood pressure. For the last three years, Ms. Chen's patient was also bedbound. Ms. Chen was required to turn and reposition the patient every two hours according to the patient's care plan. Ms. Chen also assisted her patient with toileting at least two to three times each night. Her patient frequently asked for something to drink at night as well. Moreover, from 2009 to 2010, Ms. Chen was also required to care for her patient's husband. She received no extra pay for this additional work.

In August 2015, when her patient passed away, Ms. Chen requested that she no longer be assigned to 24-hour shifts. The coordinator refused. As a result, Ms. Chen had no choice but to quit.

Zhu Qin Chen

Ms. Chen was hired by CPC in May 1998. From January 2009 until June 30, 2017, when she retired, Ms. Chen cared for one patient four, consecutive 24-hour shifts per week. Ms. Chen's patient suffered from Alzheimer's/dementia, diabetes, high blood pressure, and used assistive breathing equipment. The patient's care plan required that Ms. Chen turn and reposition the patient every two hours, including throughout the night. At least two or three times per night, and occasionally as often as ten or eleven times, Ms. Chen's patient would ask for help with toileting. Ms. Chen would either change her patient's diaper, bring him to the bathroom, or assist him with using a bedside commode.

Rui Ling Huang

Ms. Huang was hired by CPC in September 2006. From approximately November 2012 until approximately January 2014, Ms. Huang worked two consecutive, 24-hour shifts per week caring for a patient whose care plan required Ms. Huang to turn and reposition her patient's body every two hours. Ms. Huang also assisted her patient with toileting every two to three hours. Ms. Huang also worked additional shifts of either five, six or eight hours.

Yan Lian Huang

Ms. Huang was hired by CPC in February 2003. From approximately September 2008 until July 2015, Ms. Huang cared for a patient who suffered from Alzheimer's/dementia, high blood pressure and was bedbound. Her patient also used a urine catheter that needed to be changed every four hours at night. Throughout the night, Ms. Huang's patient also required turning and repositioning. When Ms. Huang's patient passed away in July 2015, Ms. Huang was no longer assigned work by CPC, despite her multiple requests for employment.

Yan Qin Huang

Ms. Huang was hired by CPC in or about August 2000. From January 2011 until August 2015, Ms. Huang cared for a patient who suffered from Alzheimer's/dementia, high blood pressure, Parkinson's disease, and was bedbound. The patient's care plan required that Ms. Huang turn and reposition him every two hours throughout the night. Ms. Huang also assisted her patient with toileting every three

hours. Additionally, at least two times per night, Ms. Huang's patient would also call out for help because he was uncomfortable or could not sleep.

From January 2011 to approximately May 2014, Ms. Huang worked four, consecutive 24-hour shifts per week. In or around April 2014, Ms. Huang became a "temporary" worker. Despite being a "temporary" worker only, Ms. Huang was nevertheless consistently assigned to work three, consecutive 24-hour shifts per week until approximately August 2015.

Li Yan Li

Ms. Li was hired by CPC in or about September 2011. Until approximately November 2015, Ms. Li worked alternating weeks of either three or four consecutive, 24-hour shifts. From approximately July 2012 until approximately August 2013, Ms. Li cared for a patient suffering from Alzheimer's/dementia whose care plan required that Ms. Li assist her with toileting every two hours. From approximately August 2013 to approximately April 2015, Ms. Li cared for a patient in her nineties who suffered from Alzheimer's/dementia. At some point, the patient also became bedbound and required the assistance of breathing equipment. In accordance with the patient's care plan, Ms. Li was required to turn and reposition her patient every two hours throughout her shift. Ms. Li also assisted her patient with toileting at least two to three times each night, either helping to change her patient's diaper or to use a commode. For three weeks in or about May 2015, Ms. Li cared for a patient who woke up between eight and ten times per night. After this patient died, Ms. Li was assigned to care for a blind patient in her seventies suffering from Alzheimer's/dementia, high blood pressure, and diabetes. From approximately June 2015 to approximately November 2015, Ms. Li helped this patient with turning and repositioning as well as toileting every two hours, as directed by the patient's care plan. Ms. Li would also provide the patient with water and other drinks throughout the night. From approximately November 2015 until she retired in or about June 2016, Ms. Li no longer worked twenty-four hour shifts. Instead, she was assigned to work three, 9-hour shifts per week for which she was only paid for eight hours.

Mei Fang Li

Ms. Li was hired by CPC in or about 2005. From December 2012 until approximately August 2014, Ms. Li cared for an eighty-year old patient who suffered from Alzheimer's/dementia, required the assistance of breathing equipment, and was bedbound. Ms. Li's patient required turning and repositioning every two hours, in accordance with the patient's care plan. Ms. Li also changed the patient's diaper at least three times each night, in addition to emptying the patient's urine bag. Due to the patient's dementia, Ms. Li's patient would frequently yell out loud and call for Ms. Li. From approximately September 2014 until approximately August 2018, Ms. Li was assigned to either 8 or 10 hour shifts, two days per week. Beginning or around September 2018, Ms. Li was assigned two, 12-hour shifts per week. Since approximately April 2019, Ms. Li has also been assigned to work one additional 5-hour shift per week.

Yu Yan Mei

Ms. Mei was hired by CPC in or about March 2005. From May 2012 until March 2017, Ms. Mei cared for a patient who was almost 100 years old and who suffered from Alzheimer's/dementia, diabetes, high blood pressure, and deafness. Ms. Mei's patient required assistance with using a commode between

three and five times per night. Ms. Mei's patient would also call her to his side an additional five to six times each night. Between March 2017 and June 2017, when Ms. Mei retired, she was only assigned to work sporadically, three or four hours shifts a few days a week.

Rui Xiang Pan

Ms. Pan was hired by CPC in or around October 2005. From October 2005 until approximately September 2013, Ms. Pan worked alternating weeks of three or four consecutive, 24-hour shifts caring for a patient who suffered from Alzheimer's/dementia and was bedbound. Although her patient's care plan did not specify turning and repositioning, Ms. Pan nevertheless provided this care to her patient to prevent her from developing bedsores. Ms. Pan also assisted her patient with toileting, changing her diaper every three hours. After her patient died in or around October 2013, Ms. Pan worked three, 12-hour shifts per week for a short time before being reassigned to 24-hour shift work. From approximately October 2013 until January 2015, when she retired, Ms. Pan worked three consecutive, 24-hour shifts per week caring for a patient who required assistance with toileting at least three times each night.

Ya Huan Tan

Ms. Tan was hired by CPC in or about May 2004. From approximately January 2010 until she retired from CPC in or around August 2015, Ms. Tan worked alternating weeks of three or four consecutive, 24-hour shifts caring for a patient who suffered from Alzheimer's/dementia, diabetes, high blood pressure, and deafness. Ms. Tan would assist her patient with toileting between three and five times per night. Approximately five or six times per night, Ms. Tan's patient would also call her to his side in distress or seeking assistance.

Sau Lin Wong

Ms. Wong was hired by CPC in 2006. From 2012 until 2014, Ms. Wong worked alternating weeks of three and four consecutive, 24-hour shifts caring for a patient in her eighties who suffered from Alzheimer's/dementia, diabetes, and high blood pressure. Due to her dementia, Ms. Wong's patient did not sleep at night. As a result, she would ask for food, water and other assistance throughout the night, including assistance with toileting. Ms. Wong's patient also suffered from delusions. For example, Ms. Wong's patient once believed that she was being attacked by tigers. She would often try to leave the apartment. One time, despite Ms. Wong's vigilance, her patient managed to leave the apartment. Ms. Wong immediately notified CPC, which located the patient only after several hours. During this time, Ms. Wong also worked two additional 12-hour shifts per week.

From approximately January 2015 until approximately October 2015, when she retired, Ms. Wong worked between two and four, consecutive 24-hour shifts per week caring for a patient who suffered from Alzheimer's/dementia and high blood pressure. Ms. Wong's patient required assistance using the bathroom at least three times per night. Ms. Wong would also be asked to provide assistance another two to three times per night, helping the patient make drinks, feeding the patient some fruit and cleaning up after the patient. Despite his advanced age (Ms. Wong's patient was approximately ninety-years old), Ms. Wong's patient insisted on doing tasks independently. For example, he insisted on changing lightbulbs and doing other electrical work throughout his home. Ms. Wong felt very concerned about his safety and sought guidance from CPC. CPC instructed her to watch the patient carefully at all times.

As such, Ms. Wong felt compelled to monitor the patient's safety at all times, including at night, to prevent injuries from happening.

Xue Rou Xie

Ms. Rou was hired by CPC in November 2007. From January 2013 until approximately October 2017, Ms. Xie worked three consecutive, 24-hour shifts per week. From approximately October 2017 until June 2018, when she retired, Ms. Xie worked four, consecutive 24-hour shifts for week. Throughout this entire period, Ms. Rou cared for one individual, a patient suffering from Alzheimer's/dementia and high blood pressure who became completely paralyzed in 2012. Ms. Xie's patient required turning and repositioning every two hours, in accordance with the patient's care plan. Ms. Xie also changed the patient's diaper every two hours.

Yue Fang Chan Yang

Ms. Yang began working for CPC in or about August 2008. From approximately January 2009 until the end of 2013, Ms. Yang worked four, consecutive 24-hour shifts per week. Beginning in 2014 until May 2014 when Ms. Yang was forced to retire due to a workplace injury that has left her permanently disabled, Ms. Yang alternated between three and four consecutive, 24-hour shifts per week. In 2014, Ms. Yang also worked 6 or 7-hour shifts, three days per week.

When working 24-hour shifts, Ms. Yang cared for a patient who was in his nineties and suffered from Alzheimer's/dementia, high blood pressure and Parkinson's disease. Ms. Yang assisted her patient with toileting at least two times per night. Ms. Yang's patient also slept extremely little during the night, and would regularly ask Ms. Yang to prepare food and drink for nighttime meals. Ms. Yang was also constantly concerned that her patient would leave the home. Once, before her patient was certified for 24-hour care, Ms. Yang's patient wandered out of the home in the middle of the afternoon. It took Ms. Yang three hours to locate him. Therefore, to prevent her client from being able to leave the apartment without her noticing, Ms. Yang set up her bed in the hallway of the patient's home.

Xiao Huan Yu

Ms. Yu started working for CPC in or about July 2005. From 2009 until approximately September 2016, Ms. Yu worked three consecutive, 24-hour shifts per week caring for a patient who suffered from seizures, blindness, high blood pressure and was totally paralyzed. Ms. Yu turned and repositioned her patient every two hours, even though her patient's care plan did not specify such care, to prevent her patient from developing bedsores. Ms. Yu would also change her patient's diaper every two hours. When changing her diaper, Ms. Yu would also bathe her patient's genital area. If Ms. Yu failed to include this step, Ms. Yu's patient would develop sores the next day.

From 2009 until the end of 2013, Ms. Yu also worked an additional 12-hour shift, one day per week.

From approximately October 2016 until approximately February 2018, Ms. Yu worked two consecutive, 24-hour shifts per week caring for a patient who suffered from Alzheimer's/dementia and was completely bedbound. Ms. Yu's patient required turning and repositioning every two hours, in accordance with the patient's care plan. Ms. Yu also assisted the patient with toileting at least three times each night. Due to the patient's dementia, the patient would shout all night – sometimes asking

for water but frequently just yelling in distress. At some point, Ms. Yu began to submit night work forms, seeking to be paid for her extensive night time work. CPC instructed her to stop submitting the forms because the other care givers who provided care to the same patient on alternating days did not submit night work forms. When Ms. Yu continued to submit her night work forms, CPC terminated her employment.

Anna Zhang

Ms. Zhang was hired in February 2011. From February 2012 until November 2014, Ms. Zhang cared for a patient who suffered from Alzheimer's/dementia. From approximately May 2013 until November 2014, Ms. Zhang worked alternating weeks of two and three consecutive, 24-hour shifts. Ms. Zhang's patient did not sleep at night, requiring Ms. Zhang to do such tasks as prepare meals, drinks, and assist with toileting. Ms. Zhang's patient would also shout at out night, asking for help with many of his hallucinations. Ms. Zhang's bed was placed directly next to her patient's bed, with only a thin, wooden board separating them. As a result, whenever Ms. Zhang's patient rose from his bed, Ms. Zhang would also get up as well. Ms. Zhang was particularly concerned about her patient wandering out of the apartment.

From November 2014 until approximately March 2017, when Ms. Zhang was effectively laid off by CPC, Ms. Zhang was a "replacement" worker, picking up shifts that her coworkers could not work. These shifts tended to be much shorter – usually 4, 8 and 12-hour shifts. Ms. Zhang never worked more than 40-hours per week. Very occasionally, Ms. Zhang would also be asked to replace a worker on a 24-hour shift. However, this occurred perhaps two or three times, only, during the almost three-year period.

Qiao Yan Zhang

Ms. Zhang began working for CPC in 2005. From 2005 until approximately October 2014, when she was permanently disabled by an injury suffered on the job, Ms. Zhang cared for a patient who suffered from Alzheimer's/dementia, high blood pressure, deafness and whose left side of her body was paralyzed. Beginning in 2009, Ms. Zhang was also required to simultaneously care for her patient's husband. During the relevant, six-year lookback period, Ms. Zhang was scheduled to work two, consecutive 24-hour shifts caring for the wife-husband pair of patients. Ms. Zhang also worked two additional 12-hour shifts per week.

Ms. Zhang's female patient required turning and repositioning every two hours, in accordance with her care plan. She also needed to have her diaper changed extremely frequently, during some periods as often as every ten minutes. Due to her dementia, even when she had not urinated or defecated, Ms. Zhang's patient would shout for help and claim that she needed her diaper to be changed. Ms. Zhang's male patient only required assistance with using the bathroom one or two times per night, until he approached his death when he needed assistance as much as ten times per night.

Xiao Wen Zhen

Ms. Zhen began working for CPC in or around March 2005. Throughout her employment until approximately January 15, 2019, Ms. Zhen alternated between three and four consecutive, 24-hour shifts

per week. From January 15, 2019 until approximately April 15, 2019, Ms. Zhen worked four, 7-hour shifts per week. Since April 15, 2019, Ms. Zhen has worked two, 12-hour shifts per week.

From January 2009 until approximately December 28, 2018, Ms. Zhen cared for a patient who suffered from diabetes, high blood pressure and required the assistance of breathing equipment. Ms. Zhen would assist her patient with toileting, either by changing his diaper or by bringing him to the bathroom, between two and three times per night. Ms. Zhen would also be asked to assist him during the night to provide water to drink about two to three times per night.

Cui Chan Zhu

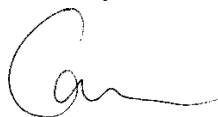
Ms. Zhu was hired by CPC in 2005. From approximately April 2010 until approximately February 2013 and then again from January 2014 to March 2014, Ms. Zhu worked four consecutive, 24-hour shifts per week caring for a patient who suffered from Alzheimer's/dementia. Ms. Zhu was required to assist her patient with toileting two to three times per night. She was occasionally required to clean up the patient's bed and clothing at night as well.

From approximately April 2014 until approximately August 2018, Ms. Zhu worked two consecutive, 24-hour shifts per week caring for a patient who suffered from Alzheimer's/dementia. Ms. Zhu assisted her patient with toileting, by either changing her patient's diaper or bringing the patient to the bathroom, approximately two to three times per night. From April 2018 until August 2018, Ms. Zhu also worked four, 12-hour shifts per week.

None of the claimants were able to sleep for five hours, continuously and without interruption, when assigned to work 24-hour shifts. None of the claimants received three hours of duty-free meal breaks per shift. Therefore, all twenty-four hours of claimants' shifts are compensable work time. Moreover, none of the claimants received spread of hours pay. On the rare occasions when they received overtime pay, only thirteen of the claimants' 24-hour shifts were counted towards overtime accrual. Finally, Ms. Lai Yee Chan and Ms. Xiao Huan Yu both suffered retaliation when they persisted in requesting pay for work performed at night. Ms. Su Zhen Chen was also forced to quit her employment at CPC when the agency refused to satisfy her request to be assigned to work other than 24-hour shifts.

If you have any questions or require additional information, please do not hesitate to reach out to me using the contact information listed in the letterhead above.

Sincerely,



Carmela Huang
Supervising Attorney

Exhibit 7

Collective Bargaining Agreement between 1199SEIU United Healthcare Workers East and Chinese-American Planning Council

August 8, 2012

(excerpted)

[For Covered Employees on Cases Never HRA]

-----	X
COLLECTIVE BARGAINING AGREEMENT	:
	:
between	:
	:
1199SEIU UNITED HEALTHCARE WORKERS EAST	:
	:
and	:
	:
CHINESE-AMERICAN PLANNING COUNCIL HOME	:
ATTENDANT PROGRAM, INC.	:
	:
-----	X

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AGREEMENT made and entered into this 8th day of August, 2012 by and between CHINESE-AMERICAN PLANNING COUNCIL HOME ATTENDANT PROGRAM, INC. with its offices at One York Street, 2nd Floor, New York, New York 10013 (hereinafter called the "Employer"), and 1199SEIU UNITED HEALTHCARE WORKERS EAST with its offices at 310 West 43rd Street, New York, New York (hereinafter referred to as the "Union").

WITNESSETH:

WHEREAS, the Employer is engaged in the business of providing home care services to Patients, as defined herein;

WHEREAS, the Employer and the Union are parties to a collective bargaining agreement covering Home Attendants assigned to cases for which the Employer is reimbursed by the New York State Medicaid Management Information Systems and funded by New York State under contract with the City of New York, Human Resources Administration, Personal Care Program and/or other Medicaid funded program of the City of New York ("HRA funded cases"); and

WHEREAS, the Employer and the Union also are parties to a collective bargaining agreement covering Home Health Aides and Personal Care Aides I and II assigned to cases formerly funded by New York State under contract with the City of New York, Human Resources Administration, Personal Care Program and/or other Medicaid funded program of the City of New York ("HRA funded cases"), which cases have been and continue to be assigned to the Employer by Managed Care Organizations ("MCOs") and Managed Long Term Care Providers ("MLTCPs") and other non-HRA Funded Case Programs, excluding the New York City Department for the Aging Funded Care Program; and

7. This Article does not apply with respect to emergency or temporary replacement of Employees by temporary or "on-call" employees. For such purposes the Employer shall utilize a listing of "on-call" employees irrespective that more senior Employees may be unplaced.

ARTICLE X
WAGES

1. Employees employed on an hourly basis shall receive a Base Rate of Pay (the "Base Rate") for each hour of work as set forth below:

March 1, 2012	\$9.00 per hour
---------------	-----------------

2. Employees are eligible to receive Social Security benefits and New York State Unemployment Compensation, Workers' Compensation and Disability Insurance benefits.

3. Employees assigned as a "live-in" to remain in a Patient's home for a full twenty-four hours in a day will be paid a Per Diem Rate, as set for below:

March 1, 2012	\$117 per diem
---------------	----------------

Per Diem Rates are paid without reference to the actual hours worked per day.

4. All wages shall be paid not less frequently than bi-weekly in cash or by check at the sole option of the Employer, unless the Employee has elected to be paid by direct deposit. Employees hired after the effective date of this Agreement shall be paid by direct deposit.

ARTICLE XI
HOURS

1. Due to the manner in which cases are referred to the Employer, there is no guaranteed work day, week or year, or hours of work for any Employee.

2. Except in emergencies, no employee shall be required to work more than six (6) consecutive days in a payroll week.

Exhibit 8

Recapitulation Sheets

July 16, 2015

Case # LS00 2014002578

RECAPITULATION SHEET - PRELIMINARY REPORT

SUMMARY OF CLAIMS FOR UNPAID WAGES, WAGE SUPPLEMENTS OR WAGES DUE UNDER THE PROVISIONS OF THE MINIMUM WAGE ORDER AND/OR STATUTORY MINIMUM RATE UNDER THE NEW YORK STATE MINIMUM WAGE ACT, GOVERNING WAGES IN THE INDUSTRY

NAME AND ADDRESS OF EMPLOYER CAPC HME Attending Prog 8 1 York St 2nd Floor New York NY 10013		FEIN _____ ESTABLISHMENT I.D. LS00 2014002578	INVESTIGATOR Bin Bin Yu
			DATE 07/16/2015

Note: Violation of the Wage and benefit Sections of the Labor Law is a misdemeanor for a first offense and a felony for a second offense. The amount listed on this Recapitulation Sheet is the total gross due to the employee(s) listed. If you remit the net amount due you must itemize the legal deductions for each employee separately on an additional sheet.

THE EMPLOYEES LISTED BELOW ARE DUE: Minimum Wage

NAME AND SOCIAL SECURITY NUMBER OF EMPLOYEE	ADDRESS	PERIOD COVERED BY CLAIM OR UNDER-PAYMENT	Amount Due	Gross Amount Due	Liquidated Damages	Total Liquidated Damages	Grand Total Due	TOTAL DEDUCTIONS	NET DUE AFTER ALL DEDUCTIONS
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to:									
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to:									
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to:									
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to:									
CHAN, LAI YEE ###-##-2008	345 WEBSTER AVE. # 5W BROOKLYN NY 11230	10/06/2007 to 11/09/2012	Min Wage \$362.95		\$0.00				
Total Amounts Due to: CHAN, LAI YEE				\$362.95		\$0.00	\$362.95		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to:									

Case # LS00 2014002572

RECAPITULATION SHEET - PRELIMINARY REPORT

SUMMARY OF CLAIMS FOR UNPAID WAGES, WAGE SUPPLEMENTS OR WAGES DUE UNDER THE PROVISIONS OF THE MINIMUM WAGE ORDER AND/OR STATUTORY MINIMUM RATE UNDER THE NEW YORK STATE MINIMUM WAGE ACT, GOVERNING WAGES IN THE INDUSTRY

NAME AND ADDRESS OF EMPLOYER CAPC HME Attending Prog 2 1 York St 2nd Floor New York NY 10013		FEIN _____ ESTABLISHMENT I.D. LS00 2014002572	INVESTIGATOR Bin Bin Yu	DATE 07/16/2015
--	--	--	----------------------------	--------------------

Note: Violation of the Wage and benefit Sections of the Labor Law is a misdemeanor for a first offense and a felony for a second offense. The amount listed on this Recapitulation Sheet is the total gross due to the employee(s) listed. If you remit the net amount due you must itemize the legal deductions for each employee separately on an additional sheet.

THE EMPLOYEES LISTED BELOW ARE DUE: Minimum Wage

NAME AND SOCIAL SECURITY NUMBER OF EMPLOYEE	ADDRESS	PERIOD COVERED BY CLAIM OR UNDER-PAYMENT	Amount Due	Gross Amount Due	Liquidated Damages	Total Liquidated Damages	Grand Total Due	TOTAL DEDUCTIONS	NET DUE AFTER ALL DEDUCTIONS
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]						
Total Amounts Due to: [REDACTED]									
CHEN, HUI LIN ###-##-4086	1058 64 ST. 2/FL BROOKLYN NY 11219	08/25/2007 to 02/08/2013	Min Wage \$629.62		\$0.00				
Total Amounts Due to: CHEN, HUI LIN				\$629.62		\$0.00	\$629.62		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]						
Total Amounts Due to: [REDACTED]									
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]						
Total Amounts Due to: [REDACTED]									
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]						
Total Amounts Due to: [REDACTED]									
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]						
Total Amounts Due to: [REDACTED]									

Case # LS00 2014002578

RECAPITULATION SHEET - PRELIMINARY REPORT

SUMMARY OF CLAIMS FOR UNPAID WAGES, WAGE SUPPLEMENTS OR WAGES DUE UNDER THE PROVISIONS OF THE MINIMUM WAGE ORDER AND/OR STATUTORY MINIMUM RATE UNDER THE NEW YORK STATE MINIMUM WAGE ACT, GOVERNING WAGES IN THE INDUSTRY

NAME AND ADDRESS OF EMPLOYER CAPC HME Attending Prog 8 1 York St 2nd Floor New York NY 10013		FEIN _____ ESTABLISHMENT I.D. LS00 2014002578	INVESTIGATOR Bin Bin Yu
			DATE 07/16/2015

Note: Violation of the Wage and benefit Sections of the Labor Law is a misdemeanor for a first offense and a felony for a second offense. The amount listed on this Recapitulation Sheet is the total gross due to the employee(s) listed. If you remit the net amount due you must itemize the legal deductions for each employee separately on an additional sheet.

THE EMPLOYEES LISTED BELOW ARE DUE: Minimum Wage

NAME AND SOCIAL SECURITY NUMBER OF EMPLOYEE	ADDRESS	PERIOD COVERED BY CLAIM OR UNDER-PAYMENT	Amount Due	Gross Amount Due	Liquidated Damages	Total Liquidated Damages	Grand Total Due	TOTAL DEDUCTIONS	NET DUE AFTER ALL DEDUCTIONS
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to: [REDACTED]				[REDACTED]		[REDACTED]	[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to: [REDACTED]				[REDACTED]		[REDACTED]	[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to: [REDACTED]				[REDACTED]		[REDACTED]	[REDACTED]		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to: [REDACTED]				[REDACTED]		[REDACTED]	[REDACTED]		
XIE, XUE ROU ###-##-8492	1726 79TH STREET BROOKLYN NY 11214	08/09/2008 to 12/21/2012	Min Wage \$447.59		\$0.00				
Total Amounts Due to: XIE, XUE ROU				\$447.59		\$0.00	\$447.59		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]		[REDACTED]				
Total Amounts Due to: [REDACTED]				[REDACTED]		[REDACTED]	[REDACTED]		

Exhibit 9

Chinese-American Planning Council Home Care Infographic

Advocating for 12-Hour Split Shift Cases in Home Care

OVERVIEW OF CPC AND CPCHAP



Founded in 1965, **Chinese-American Planning Council, Inc. (CPC)** is a social services organization that empowers Asian American, immigrant, and low-income communities in New York City by ensuring they have equitable access to the resources and opportunities needed to thrive. Today, CPC is the nation's largest Asian American social services organization and is the trusted partner to 60,000 individuals and families. www.cpc-nyc.org



CPC's subsidiary, **The Chinese-American Planning Council Home Attendant Program, Inc. (CPCHAP)** was licensed in 1998 by the NYS Department of Health as a home care service agency. CPCHAP serves about 3,000 home care recipients – the majority of whom are homebound seniors and people with disabilities – and employs over 4,000 home care workers throughout the five boroughs of New York City. www.cpchap.org

BACKGROUND ON NYS MEDICAID-FUNDED HOME CARE SERVICES

Current Reality:

Since the 1970s, the 24-hour rule has been set and enforced by the State – workers have 24-hour shifts and are compensated for 13 hours. All of NYC's home care agencies – including CPCHAP – are held to reimbursement rates and requirements laid out by the State and union agreements.

Path to Abolishing 24-Hour Shifts:

The 24-hour rule must be banned and replaced with 12-hour split shifts, while still ensuring that everyone who needs home care gets it. CPC has been advocating for this and better wages for home care workers for years. Our NYS patients and caregivers deserve no less.

Only the Governor and State Legislature can end the 24-hour rule.

Join us in advocating for A3145 (Epstein) to require 12-hour split shifts instead.

It will cost the State \$1 billion (of a \$212 billion budget) to compensate two 12-hour split shifts.

FACTS ON CPC HOME ATTENDANT PROGRAM



CPCHAP has less than 1% of NYS 24-hour live-in cases

We represent a small minority of all cases, even though one case is too many – that's why CPC is advocating for a State-level solution for all.

PATIENTS

NYS has ~11,000 24-hour live-in cases

CPCHAP accounts for only 54 of those cases (0.49% of NYS)

WORKERS

NYS has ~33,000 home care workers with 24-hour cases

CPCHAP accounts for only 124 of those workers (0.37% of NYS)



24-Hour Care Lawsuits: An Industry Problem Created by State Government

140+ lawsuits

CPCHAP is one of 40+ nonprofit home care agencies in 1199SEIU arbitration



Our home care workers are critically important to us:

• Keeping our workers safe – at work and at home

Over the last year, we have distributed significantly more PPE than required, including face shields, N95 and KN95 masks, and more.

• Ensuring compensation for interruptions before industry standard

Our live-in workers receive 11 hours of sleep and meal time and are compensated for interruptions. We apply for split shifts for repeated interruptions.

• Eliminating hassle of travel to work

Our aides delivering emergency care receive car service reimbursement or monthly unlimited MetroCards.

• Having a strong, healthy relationship with 1199SEIU – the union representing our workers

Union benefits available to our workers include pension, health insurance, higher weekend rates, and more.



CPCHAP must retain all 24-hour cases. We cannot terminate any existing cases because of the Patients' Bill of Rights: When presented with a 24-hour case, CPCHAP strongly seeks State-authorization for split shifts, yet these requests are repeatedly refused by NYC and NYS. This is why the system must change.



As a nonprofit with government contracts, CPC cannot redirect funds to cover 24-hour shifts: More than 94% of our funding is provided by the government and restricted. Legally, according to those government contracts, CPC is prohibited from transferring funds to home care or any other programs. Funds may only be used for the programs for which they were designated.

Exhibits - Page 78

Exhibit 10

New York State Department of Labor Minimum Wage Order for Miscellaneous Industries and Occupations

December 31, 2016

(excerpted)

Minimum Wage Order for Miscellaneous Industries and Occupations

Part 142 of Title 12 of the Official Compilation of Codes, Rules, and Regulations of the state of New York
(Cited as 12 NYCRR 142)

Promulgated by the Commissioner of Labor Pursuant to the Minimum Wage Act
(Article 19 of the New York State Labor Law)

Statutory authority: Labor Law Section 21(11) and Labor Law Section 652



As amended
Effective December 31, 2016

PART 142
MISCELLANEOUS INDUSTRIES AND OCCUPATIONS

- Subpart 142-1 Coverage**
- Subpart 142-2 Provisions Applicable to All Employees Subject to This Part, Except Employees in Nonprofitmaking Institutions Covered by the Provisions of Subpart 142-3**
- Subpart 142-3 Provisions Applicable to Employee in Nonprofitmaking Institutions Which Have Not Elected to be Exempt from Coverage Under a Minimum Wage Order**

SUBPART 142-1
COVERAGE

Sec.

142-1.1 Coverage of Part.

§ 142-1.1 Coverage of Part

This Part shall apply to all employees, as such term is defined in this Part, except:

(a) employees who are covered by minimum wage standards in any other minimum wage order promulgated by the commissioner; and

(b) employees of a nonprofitmaking institution which has elected to be exempt from coverage under a minimum wage order, pursuant to subdivision 3 of section 652 of the Minimum Wage Act.

SUBPART 142-2
PROVISIONS APPLICABLE TO ALL EMPLOYEES SUBJECT TO THIS PART, EXCEPT
EMPLOYEES IN NONPROFITMAKING INSTITUTIONS COVERED BY THE PROVISIONS OF
SUBPART 142-3

Sec.

142-2.1 Basic minimum hourly wage rate and allowances

142-2.2 Overtime rate

142-2.3 Call-in pay

142-2.4 Additional rate for split shift and spread of hours

142-2.5 Allowances

REGULATIONS

142-2.6 Employer records

142-2.7 Statement to employee

142-2.8 Posting

142-2.9 Basis of wage payment

142-2.10 Deductions and expenses

142-2.11 Student obtaining vocational experience

142-2.12 Learner and apprentice rates

142-2.13 Rehabilitation programs

DEFINITIONS

142-2.14 Employee

142-2.15 Voluntary absence

142-2.16 Regular rate

- 142-2.17 Split shift
- 142-2.18 Spread of hours
- 142-2.19 Meal
- 142-2.20 Lodging
- 142-2.21 Tips
- 142-2.22 Required uniform
- 142-2.23 Student

§ 142-2.1 Basic minimum hourly wage rate and allowances.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) *New York City* for

(i) *Large employers* of eleven or more employees

\$11.00 per hour on and after December 31, 2016;
 \$13.00 per hour on and after December 31, 2017;
 \$15.00 per hour on and after December 31, 2018;

(ii) *Small employers* of ten or fewer employees

\$10.50 per hour on and after December 31, 2016;
 \$12.00 per hour on and after December 31, 2017;
 \$13.50 per hour on and after December 31, 2018;
 \$15.00 per hour on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

\$10.00 per hour on and after December 31, 2016;
 \$11.00 per hour on and after December 31, 2017;
 \$12.00 per hour on and after December 31, 2018;
 \$13.00 per hour on and after December 31, 2019;
 \$14.00 per hour on and after December 31, 2020;
 \$15.00 per hour on and after December 31, 2021,

(3) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

\$9.70 per hour on and after December 31, 2016;
 \$10.40 per hour on and after December 31, 2017;
 \$11.10 per hour on and after December 31, 2018;
 \$11.80 per hour on and after December 31, 2019;
 \$12.50 per hour on and after December 31, 2020.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors, such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work: (1)

during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.

§ 142-2.2 Overtime rate.

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 et seq., the Fair Labor Standards Act of 1938, as amended, provided, however, that the exemptions set forth in section 13(a)(2) and (4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(2) and (4) of such act, overtime at a wage rate of one and one-half times the basic minimum hourly rate. The Fair Labor Standards Act is published in the United States Code, the official compilation of Federal statutes, by the Government Printing Office, Washington, DC. Copies of the Fair Labor Standards Act are available at the following office:

New York State Department of Labor
Counsel's Office
State Office Building Campus,
Building 12, Room 509
Albany, NY 12240-0005

The applicable overtime rate shall be paid for each workweek:

	<i>Non-residential employees</i>	<i>Residential employees</i>
For working time over	40 hours	44 hours

§ 142-2.3 Call-in pay.

An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.

§ 142-2.4 Additional rate for split shift and spread of hours.

An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which:

- (a) the spread of hours exceeds 10 hours; or
- (b) there is a split shift; or
- (c) both situations occur.

SUBPART 142-3

PROVISIONS APPLICABLE TO EMPLOYEES IN NONPROFITMAKING INSTITUTIONS WHICH HAVE NOT ELECTED TO BE EXEMPT FROM COVERAGE UNDER A MINIMUM WAGE ORDER

Sec.

MINIMUM WAGE AND REGULATIONS

- 142-3.1 Basic minimum hourly wage rate
- 142-3.2 Overtime rate
- 142-3.3 Call-in pay
- 142-3.4 Additional rate for split and spread of hours
- 142-3.5 Allowances
- 142-3.6 Employer payroll records requirements for nonprofitmaking institutions
- 142-3.7 Required personnel records for nonprofitmaking institutions
- 142-3.8 Statement to employee
- 142-3.9 Posting
- 142-3.10 Basis of wage payment
- 142-3.11 Deductions and expenses

DEFINITIONS

- 142-3.12 Employee
- 142-3.13 Nonprofitmaking institution
- 142-3.14 Regular rate
- 142-3.15 Split shift
- 142-3.16 Spread of hours
- 142-3.17 Meal
- 142-3.18 Lodging
- 142-3.19 Required uniform

MINIMUM WAGE AND REGULATIONS

§ 142-3.1 Basic minimum hourly wage rate.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) *New York City* for

(i) *Large employers* of eleven or more employees

\$11.00 per hour on and after December 31, 2016;

\$13.00 per hour on and after December 31, 2017;

\$15.00 per hour on and after December 31, 2018;

(ii) *Small employers* of ten or fewer employees

\$10.50 per hour on and after December 31, 2016;

\$12.00 per hour on and after December 31, 2017;

\$13.50 per hour on and after December 31, 2018;

\$15.00 per hour on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

\$10.00 per hour on and after December 31, 2016;

\$11.00 per hour on and after December 31, 2017;
\$12.00 per hour on and after December 31, 2018;
\$13.00 per hour on and after December 31, 2019;
\$14.00 per hour on and after December 31, 2020;
\$15.00 per hour on and after December 31, 2021,

(3) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

\$9.70 per hour on and after December 31, 2016;
\$10.40 per hour on and after December 31, 2017;
\$11.10 per hour on and after December 31, 2018;
\$11.80 per hour on and after December 31, 2019;
\$12.50 per hour on and after December 31, 2020.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors. Such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer-- shall not be deemed to be permitted to work or required to be available for work:

(1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or

(2) at any other time when he or she is free to leave the place of employment.

§ 142-3.2 Overtime rate.

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 *et seq.*, the Fair Labor Standards Act of 1938, as amended, provided, however that the exemptions set forth in section 13(a)(4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(4) of such act, overtime at a wage rate of one and one-half times the basic minimum hourly rate. The Fair Labor Standards Act is published in the *United States Code*, the official compilation of Federal statutes, by the Government Printing Office, Washington, DC. Copies of the Fair Labor Standards Act are available at the following office:

New York State Department of Labor
Counsel's Office
State Office Building Campus
Building 12, Room 509
Albany, NY 12240-0005

The applicable overtime rate shall be paid for each workweek:

	<i>Non-residential employees</i>	<i>Residential employees</i>
For working time over	40 hours	44 hours

This provision shall not apply to residential house parents in children's homes.

§ 142-3.3 Call-in pay.

An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.

§ 142-3.4 Additional rate for split and spread of hours.

An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required herein for any day in which:

- (a) the spread of hours exceeds 10 hours;
- (b) there is a split shift; or
- (c) both situations occur.

§ 142-3.5 Allowances.

(a) *Allowances for meals, lodging and utilities for all employees except employees in children's camps.*

(1) Meals and lodging furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

(i) Meals, for work performed in

(a) *New York City* for

(1) *Large employers* of eleven or more employees

\$3.80 per meal on and after December 31, 2016;
\$4.50 per meal on and after December 31, 2017;
\$5.15 per meal on and after December 31, 2018;

(2) *Small employers* of ten or fewer employees

\$3.60 per meal on and after December 31, 2016;
\$4.15 per meal on and after December 31, 2017;
\$4.65 per meal on and after December 31, 2018;
\$5.15 per meal on and after December 31, 2019;

(b) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

\$3.45 per meal on and after December 31, 2016;
\$3.80 per meal on and after December 31, 2017;
\$4.15 per meal on and after December 31, 2018;
\$4.50 per meal on and after December 31, 2019;
\$4.80 per meal on and after December 31, 2020;

Exhibit 11

New York State Department of Labor Inter-Office Memo on Minimum Wage Status of Home Care Aides

February 1, 1984

FILE

DEPARTMENT OF LABOR - INTER-OFFICE MEMORANDUM

update

Date: February 1, 1984

To: ALL SUPERVISORS

Office: Labor Standards

From: Joseph C. Armer

Office: Labor Standards

Subject: Minimum Wage Status - Home Health Attendants who Reside in the Homes of Medicaid Clients and are Employed by Profit-making or Non-Profit Making Establishments.

Several Home Attendant cases are now before the Industrial Board of Appeals. These cases involve employees of profit-making or non-profit-making establishments who reside in the homes of Medicaid clients for the purpose of providing care and assistance to homebound individuals. The critical issues in these cases appear to be (1) are these employees exempted from Minimum Wage coverage under Section 651.5(a) of the Labor Law; (2) is the employer entitled to credit for sleeping time as non-working time for Minimum Wage purposes; and (3) is the employer entitled to take credit for on-premises meal periods as non-working time.

- 1. Are these employees exempted from Minimum Wage coverage under Section 651.5(a) of the Labor Law?

651.5(a) - - - employee does not - - - include: - individual - - - "in service as a part-time baby-sitter in the home of the employer; or someone who lives in the home of SM the employer for the purpose of serving as a companion to a sick, convalescent or elderly person and whose principal duties do not include housekeeping."

To be exempted from Minimum Wage coverage the individuals must serve as a companion to a sick, convalescent or elderly person and must live in the home of the employer. We would consider a sick person as one who is under a doctor's care; a convalescent one who is recovering from a recent illness; and an elderly person, one in his 60's or older and who requires care in getting around in the home. To qualify for the exemption, the principal duties of these persons may not include housekeeping chores. (We would accept 20% housekeeping time for the sick, convalescent or elderly -- NOTE: housekeeping time for other non-eligible family members could void the exemption). We would apply a strict interpretation to the requirement that an exempt employee be someone who lives in the home of the employer. We are supported in our interpretation by a 1969 Decision of the Board of Standards and Appeals - at that time domestics in the home of the employer were exempt from Minimum Wage coverage). Smithfield Services, Inc., a temporary help agency for domestic workers claimed that the domestic workers were employees of its respective clients (householders) to whom they were referred by it and for whom the domestics performed services. Smithfield contended these workers were, therefore, exempt from the pertinent sections of the Minimum Wage Law and Minimum Wage Order. The Board of Standards and Appeals rejected the Smithfield arguments and held that the employees did not perform their services in the home of the petitioner (Smithfield) and were covered by the Minimum Wage Law. The similarities between Smithfield and our home attendant cases are obvious. We will, therefore, not exempt these home attendants from Minimum Wage coverage under Section 651.5(a).

To: All Supervisors

February 1, 1984

2. Is the Employer Entitled to Credit for Sleeping Time as Non-Working time for Minimum Wage Purposes?

The Home Attendants who sleep in the home of the client are not residential employees sleeping in the home of the employer. Rather, they are employees who are permitted to utilize sleeping facilities provided by clients of the employer. The Division of Labor Standards has consistently held that sleeping time for a non-residential employee who is required to be on duty for a continuous period of 24 hours or more may be excluded from working time if the following conditions are met:

1. The employer and the employee agree to exclude from working time a bona fide, regularly scheduled "sleeping period" of not more than 8 hours. Where there is no such agreement, express or implied, all sleeping time will be considered as hours worked.
2. Adequate sleeping facilities are provided.
3. During a given 24 hours on duty, the scheduled sleeping period is confined to a specified period of not more than 8 hours. Sleep which occurs outside the specified 8 hour period, will not be excluded from working time.
4. If the scheduled sleeping period is interrupted by a call to duty, the interruption will be considered time worked.
5. The employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, then the entire sleep period will be considered as working time. To be counted as a reasonable night's sleep, there must be at least one uninterrupted period of continuous sleep of at least 3 hours with a total of at least 5 hours sleep during the scheduled period.

Our limited experience with the home attendant cases indicates that the attendants were engaged with the understanding that they would not be paid for sleeping time. We feel this constitutes tacit agreement; sleeping time, subject to the conditions listed above, is not working time for Minimum Wage purposes.

3. Is the Employer entitled to Take Credit for On-Premises Meal Periods for Employees who are Required to be On Duty for a Continuous Period of 24 Hours or More?

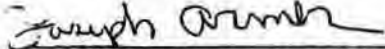
To my knowledge, this question has not progressed to a decision in any Industrial Board of Appeals case. Federal Court Decisions, however, indicate that an employer may require a continuous duty employee to remain on the premises during bona fide meal periods. Accordingly, it is the position of the Division of Labor Standards that bona fide meal periods for employees on duty for 24 hours or more may be excluded from work time up to a maximum of three hours during the 24 hour period.

To: All Supervisors

February 1, 1984

Please share the content of this memorandum with your Labor Standards Investigators and Senior Labor Standards Investigators.

I will keep you advised of any decisions that may be forthcoming from the Industrial Board of Appeals or the Courts.


Joseph C. Armer, Director
Division of Labor Standards

cc: Comm. Maher
Comm. Smith
Assistant Directors
Chiefs

JCA:jm

Exhibit 12

Memorandum of Agreement between 1199SEIU United Healthcare Workers East and Chinese-American Planning Council

December, 2015

MEMORANDUM OF AGREEMENT

WHEREAS, Chinese-American Planning Council Home Attendant Program, Inc. (the "Employer") and 1199SEIU United Healthcare Workers East (the "Union") are party to a collective bargaining agreement, dated _____, as amended by a Memorandum of Agreement, dated _____, 2014 (the "MOA" collectively, the "CBA"); and

WHEREAS, it is the intent of the parties to further modify and extend the CBA, in accordance with the terms of this Memorandum of Agreement ("this Agreement");

NOW THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

Except as otherwise expressly modified or amended in this Agreement, effective December 1, 2015, the CBA will remain in full force and effect through March 31, 2017.

CBA Article X, "Wages" is hereby modified and restated to read in full as follows:

1. Employees shall be paid no less than \$10.00 per work hour, except as otherwise stated in this Agreement (the "Base Rate").
2. Employees are eligible to receive Social Security benefits and New York State Unemployment Compensation, Workers' Compensation and Disability Insurance benefits.
3. Employees assigned to work on a weekend day shall be paid a differential of one dollar and ten cents (\$1.10) per work hour for such work on a weekend day up to a maximum of thirteen (13) work hours per day. The term "weekend" means Saturday 8 A.M. to Monday 8 A.M.
4. Employees assigned to a client designated as a "Sleep-in" case will be paid no less than \$10.00 per hour for all hours worked, excluding eight (8) hours of unpaid sleep time and three (3) hours of unpaid duty-free meal time or break periods. A "Sleep-in" case is a twenty-four (24) hour shift assignment with a Client. An Employee working a Sleep-in case shall immediately report to his/her Case Coordinator/Personnel Specialist at the completion of the Sleep-in case if the Employee was (i) unable to receive five (5) hours uninterrupted sleep-time; (ii) interrupted by a call to duty at any time during his/her total eight (8) hours sleep-time; (iii) unable to receive three (3) hours duty-free time for meal times or break periods; or (iv) interrupted by a call to duty at any time during his/her three (3) hours of meal times or break periods.
5. Employees working for two or more authorized clients in the same residence at the same time ("mutual cases") shall receive a differential of fifty cents (\$0.50) per hour of work.
6. All Employees are eligible for temporary pay increases, with the Union's consent, which shall not be unreasonably withheld, for difficult or special shift assignments when the Employer believes such temporary pay increase is appropriate. The increase may be for the duration of that Employee's assignment to the Client or such other duration as the Employer believes appropriate.

7. All wages shall be paid not less frequently than bi-weekly in cash or by check at the sole option of the Employer, unless the Employee has elected to be paid by direct deposit. Employees hired after April 1, 2012 shall be paid by direct deposit.

8. Employees who are denied entry to a Client's home will be entitled to be paid for their scheduled shift or four hours at the minimum wage, whichever is less.

9. In the event the State or Federal minimum wage increases above \$10.00 per hour, the minimum rate of home care compensation under the New York State Home Care Worker Wage Parity Law ("Wage Parity Law") increases, or additional State or Federal monies are otherwise made available for wage increases, the parties shall meet and discuss the application of such increases or additional monies.

10. Effective October 13, 2015, an Employee who works for the Employer more than forty (40) hours in a workweek will be paid overtime pay at the rate of 1 and ½ times the Employee's regular rate ("Overtime Pay") for hours worked in excess of forty (40) during such week ("Overtime Hours"). An Employee entitled to Overtime Pay for a particular hour will not be eligible to receive differential pay (including but not limited to weekend differential or mutual case differential) for that same hour. For example, for an Episode of Care Overtime Hour on a weekend, the Employee would be paid \$15.00 (not \$1.10 differential in addition to \$15.00 per hour).

CBA Article XI, "Hours" is hereby modified and restated to read in full, as follows:

1. Due to the manner in which cases are referred to the Employer by its Contracting Entities, there can be no guaranteed work day, week or year, or hours of work.

2. Except in emergencies, no Employee may be required to work more than six (6) consecutive days in a payroll week.

3. Consistent with applicable law, the Employer may designate certain hours on Sleep-in cases as sleep-time and other hours as duty free time. Employees who are assigned to work Sleep-in cases will be allowed eight (8) hours of unpaid sleep time and three (3) hours of unpaid duty-free meal time or break periods. Employees assigned Sleep-in cases will sign an individual agreement with the Employer acknowledging Sleep-in rules and procedures.

4. If an Employee chooses to obtain certification as a home health aide or any other classification, time in training does not constitute hours worked.

5. If an Employee works two or more cases in a single day, travel time between case assignments constitutes hours worked. Travel time between case assignments will be paid at the higher of the Federal or New York State minimum wage per hour.

6. All Employees are required to be at their assigned Client's home and ready to perform services to the Client promptly at the Employer's scheduled start time, and to remain at that

location until the scheduled end time (unless Employee receives prior authorization from Employer). No Employee may leave an assignment before the scheduled end time without obtaining the Employer's prior approval, except in situations where the life, health, or safety of the Employee is endangered, in which case the Employee may leave the assignment, but must contact the Employer as soon as possible to obtain directions as to how to proceed.

7. All Employees are required to contact their Case Coordinator/Personnel Specialist by telephone at least four (4) hours prior to the commencement of an assignment if the Employee cannot cover that assignment. In the event of an emergency beyond the Employee's control, which prevents the Employee from contacting their Case Coordinator/Personnel Specialist, the Employee must provide their Case Coordinator/Personnel Specialist as much notice as possible.

8. An Employee who resigns from the Employer shall give two (2) weeks advance notice in writing of his/her resignation to the Employer.

CBA Article XIII, "Benefit Fund," is hereby retitled "Home Care Fund," and modified and restated to read in full as follows:

1. The Employer shall contribute to the 1199SEIU National Benefit Fund for Home Care Employees, or its successor ("Home Care Fund").

Through December 31, 2015, the Employer shall contribute \$2.54 per Episode of Care hour worked to the Home Care Fund. For all purposes under this Agreement, an "Episode of Care" hour worked is defined as an hour worked during which an Employee is providing physical home care services to a client, which hour is reimbursable to the Employer under its MCO, MLTCP, HRA or other Contracting Entity contract(s) and covered by the definition of episode of care in New York Public Health law, Section 3614-c(f).

2. Effective January 1, 2016, the Employer shall contribute \$2.42 per Episode of Care hour worked to the Home Care Fund excluding Overtime Hours worked. For purposes of clarity, the January 2016 contribution, due on January 30, 2016, will be calculated by multiplying all November 2015 Episode of Care hours worked by the new required rate of \$2.42 per Episode of Care hour worked.

3. The Employer's contribution to the Home Care Fund, or its successor, is due every month, no later than the 30th day of the month (except for February, which shall be due on March 2). Each month's contribution is calculated based on the number of Episode of Care hours worked reported by the Employer to the Fund for the month that was two months prior to the contribution month. By way of example, the Employer's contribution to the Home Care Fund due on November 30 of any year is calculated based on all Episode of Care hours worked reported by the Employer to the Fund for September of that year.

4. Employees must perform at least 100 Episode of Care hours worked per month for two consecutive months in order to be eligible for benefits under the Home Care Fund's

benefit plan. Eligibility will be determined based upon a two-month look back period each month pursuant to the Fund's Summary Plan Description.

5. All Employees will be eligible for Wellness and Member Assistance Program ("MAP") benefits provided by the Home Care Fund regardless of the number of Episode of Care hours worked by the Employee in any month.

6. Employer shall submit its Episode of Care hours worked eligibility file to the Home Care Fund, or its successor, not later than the 5th day of each month. In addition, by the 5th day of the month, the Employer shall submit a report to the Home Care Fund differentiating the regular hours and Overtime Hours worked by individual employees for the prior month through the last full payroll period in the month. If the Employer fails to submit this report by the 5th of the month, but separately identifies the Overtime Hours by the end of the month in which the hours are reported, the Employer will receive a prospective contribution credit for the Overtime Hours. The Overtime Hours will be used only for the purpose of determining Employee eligibility for Home Care Fund benefits.

7. The Employer shall make available to the Home Care Fund, or its successor, any pertinent records of Employees that the Home Care Fund, or its successor, requires for its operations and permit the Home Care Fund, or its successor, to audit the Employer's payroll and/or hours records, as necessary, by an auditor chosen by the Fund.

8. Eligible Employees who enroll for benefits in the Home Care Fund, or its successor, will be obligated to pay a premium ("Employee Premium"), except for Employees who only receive MAP benefits. Through December 31, 2015, the Employee Premium is \$10.00 per week; effective with the payroll of January 1, 2016, the Employee Premium is \$5.00 per week for Employee single coverage and \$15.00 per week for single plus dependents (non-spouse), or such other amounts as required by the Fund.

9. The Employer is obligated to deduct and remit to the Home Care Fund, or its successor, the Employee Premium. If an Employee does not have sufficient wages in a week to equal the Employee Premium for that week, the Employer deduction from the Employee's wages will be taken from the next week in which the Employee receives sufficient wages, along with the deduction for that week. An Employer who does not timely remit Employee Premiums will be considered delinquent by the Home Care Fund and will be subject to the Home Care Fund's or its successor's applicable collections policy.

10. In the event that the Employer fails to make contributions, remit Employee Premiums or provide records or permit audits, the Board of Trustees may terminate health insurance coverage for the Employer's Employees and/or commence legal action or may proceed to arbitration under the Trust Agreement. If a violation of the Trust Agreement is found, the Employer shall pay the costs of the action or arbitration, plus legal fees, interest and liquidated damages.

CBA Article XIV, "Education Fund," is hereby modified and restated to read in full as follows:

1. Through December 31, 2015, the Employer shall contribute to the 1199SEIU Home Care Industry Education Fund ("Education Fund") at the rate of \$0.04 per Episode of Care hour worked.
2. Effective January 1, 2016, the Employer shall contribute to the Education Fund at the rate of \$0.05 per Episode of Care hour worked excluding Overtime Hours worked. For purposes of clarity, the January 2016 contribution, due on January 30, 2016, will be calculated by multiplying all November 2015 Episode of Care hours worked by the new required rate of \$0.05.
3. If the Employer fails to submit the Episode of Care hours worked eligibility file report by the 5th of the month, but separately identifies the Overtime Hours by the end of the month in which the hours are reported, the Employer will receive a prospective contribution credit for the Overtime Hours.
4. The Employer's contribution to the Education Fund, or its successor, is due every month, no later than the 30th day of the month (except for February, which shall be due on March 2). Each month's contribution is calculated based on the number of Episode of Care hours worked reported by the Employer to the Education Fund for the month that was two months before the contribution month. By way of example, the Employer's contribution to the Education Fund due on November 30 of any year is calculated based on Episode of Care hours worked reported by the Employer to the Fund for September of that year.
5. The Employer shall make available to the Education Fund, or its successor, any pertinent records of Employees that the Education Fund, or its successor, requires for its operations and permit the Education Fund, or its successor, to audit the Employer's payroll and/or hours records, as necessary, by an auditor chosen by the Fund.
6. In the event that the Employer fails to make contributions or provide records or permit audits, the Board of Trustees may terminate coverage for the Employer's Employees and commence legal action or may proceed to arbitration under the Trust Agreement. If a violation of the Trust Agreement is found, the Employer shall pay the costs of the action or arbitration, plus legal fees, interest, and liquidated damages.

Article XV, "Holidays," is hereby modified to read in full as follows:

1. Employees are eligible for the following eight (8) holidays:

New Year's Day
Martin Luther King, Jr. Day
Presidents' Day
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

Employees who actually work on a day that is one of the eight (8) holidays listed above (the "Listed Holidays") will be paid at the rate of two (2) times the Base Rate under this Agreement for Episode of Care hours worked on the Listed Holidays, inclusive of any overtime premium. Employees who do not work on a Listed Holiday will not receive holiday pay.

3. If a Listed Holiday occurs on a weekend day, as defined in Article X, Section 3, an Employee who actually works during these hours will receive two (2) times the Employee's Base Rate for Episode of Care hours worked, plus the weekend differential (i.e. a per hour total of \$21.10).
4. There is no pyramiding of holiday pay with any differential pay under this Agreement.
5. An Employee who actually works a Sleep-in case on a Listed Holiday will be paid at the rate of two (2) times the Employee's Base Rate under this Agreement for up to thirteen (13) hours.
6. If an Employee who is scheduled to work on a holiday wishes to take the day off, such Employee must notify the Employer two (2) weeks in advance, and obtain the approval of the Case Coordinator/Personnel Specialist. In the event of an emergency situation which precludes the Employee from providing the requisite notice, the Employee must provide as much notice as practicable under the circumstances. The day off will be granted only if a suitable replacement can be found. Under no circumstances will an Employee who is scheduled to work be permitted to take a holiday off without prior notification to the Employer.

* * *

CBA Article XVI, "Paid Time Off," Paragraph 1 is hereby modified to read in full as follows:

1. Employees who have completed their probationary period with the Employer shall accrue up to fifteen (15) Paid Time Off ("PTO") Days (180 hours) per year. PTO will be

accrued at the rate of 0.0577 hours multiplied by the actual number of work hours (one PTO hour earned for each seventeen (17) hours worked by the Employee) per week to a maximum accrual of 3.45 hours per week. Notwithstanding anything to the contrary in the CBA, an Employee assigned as a Sleep-in case will accrue .7501 PTO hours for each 24 hour shift.

a. Requests for leave time using PTO must be made by the Employee to the Case Coordinator/Personnel Specialist, in writing, at least two (2) weeks prior to the date of the requested leave, unless the absence is due to sickness or injury, in which case the Employee must call in and report such illness or injury to the Case Coordinator/Personnel Specialist at least two (2) hours prior to the start of the shift, and, if requested, submit a note from their physician to the Case Coordinator/Personnel Specialist in order to receive PTO for the illness or injury. Any request for payment of PTO at the time that PTO is taken must be made to the Case Coordinator/Personnel Specialist, in writing, at least two (2) weeks prior to the date the PTO is to begin.

b. On less than two (2) weeks' notice, an Employee may request to use one (1) accrued PTO day in any fiscal year for a bona fide emergency.

c. A maximum of ten (10) PTO days (120 hours) may be carried forward from one fiscal year to another. An Employee may elect a payout at the end of a fiscal year of up to ten (10) accrued and unused PTO days (120 hours).

d. At the end of their employment, Employees will be entitled to receive payment for accrued and unused PTO, calculated at the Employee's Base Rate in effect at the time the PTO is accrued.

CBA Article XVII, "Resignation," is deleted and replaced with the new article, "Pension Fund," to read in full as follows:

1. The Employer shall contribute to the 1199SEIU Home Care Employees Pension Fund ("Pension Fund").
2. Through December 31, 2015, the Employer shall contribute \$0.14 per Episode of Care hour worked to the Pension Fund.
3. Effective January 1, 2016, the Employer shall contribute to the Pension Fund at the rate of \$0.25 per Episode of Care hour worked excluding Overtime Hours worked. For purposes of clarity, the January 2016 contribution, due on January 30, 2016, will be calculated by multiplying all November 2015 Episode of Care hours worked by the new required rate of \$0.25.
4. If the Employer fails to submit the Episode of Care hours worked eligibility file report by the 5th of the month, but separately identifies the Overtime Hours by the end of the month in which the hours are reported, the Employer will receive a prospective contribution credit for the Overtime Hours.

5. The Employer's contribution to the Pension Fund, or its successor, is due every month, no later than the 30th day of the month (except for February, which shall be due on March 2). Each month's contribution is calculated based on the number of Episode of Care hours worked reported by the Employer to the Fund for the month that was two months prior to the contribution month. By way of example, the Employer's contribution to the Pension Fund due on November 30 of any year is calculated based on Episode of Care hours worked reported by the Employer to the Fund for September of that year.

6. The Employer shall make available to the Pension Fund any pertinent records of the Employees that the Pension Fund requires for its operations and permit the Pension Fund to audit the Employer's payroll and reimbursed hours records, as necessary, by an auditor chosen by the Pension Fund.

7. In the event that the Employer shall fail to make contributions or provide records or permit audits, the Board of Trustees may commence legal action or may proceed to arbitration under the Trust Agreement. If a violation of the Trust Agreement is found, the Employer shall pay the costs of the action or arbitration, plus legal fees, interest and liquidated damages.

CBA Article XX, "Bereavement," is hereby modified and restated to read in full as follows:

1. Employees may, upon request, receive a maximum of three (3) consecutive days off with pay in the event of the death of an immediate family member (father, mother, sister, brother, child, spouse, grandparent, grandchild, and parent-in-law). The Employer may require sufficient verification of the death. It is the Employee's responsibility to timely notify the Employer of the Employee's intent to take bereavement leave. Bereavement leave must be taken in the consecutive calendar days immediately following the date of death or funeral service. Employees will be paid a bereavement day only when it falls on a day of the week when an Employee is scheduled to work. Employees will receive pay for a bereavement day equal to the Employee's Base Rate multiplied by the number of hours the Employee is scheduled to work on the day, to a maximum of thirteen (13) hours per day.

New Article ___ in the CBA, "HOME CARE WORKER WAGE PARITY LAW", is hereby created, to read in full as follows:

1. Payment of the economic terms of this Memorandum of Agreement is conditioned upon their compliance with the Home Care Worker Wage Parity Law Public Health Law, Section 3614-c. If a party claims that a term is non-compliant, the parties will immediately meet to discuss appropriate modifications to bring the MOA into compliance with the Wage Parity Law. In the event the parties cannot resolve their dispute, the matter shall be referred to Martin F. Scheinman for resolution through binding arbitration.

2. If the Employer maintains that it has insufficient funds to comply on a temporary basis with the economic terms of this Memorandum of Agreement, the Employer

shall immediately communicate with the Union and the parties will meet within 5 days to discuss appropriate delays in payment of certain economic terms of this Memorandum of Agreement (excluding base wages and contributions to the Home Care Fund, or its successor). If the parties are unable to reach agreement within five days of meeting, the matter shall be referred to Martin F. Scheinman for resolution through binding arbitration. The parties recognize that nothing herein shall be construed to relieve the Employer of any of its obligations under the Home Care Worker Wage Parity Law and/or the CBA.

New Article ___ in the CBA, "ALTERNATIVE DISPUTE RESOLUTION", is hereby created, to read in full as follows:

1. The parties agree a goal of this Agreement is to ensure compliance with all federal, state, and local wage hour law and wage parity statutes. Accordingly, to ensure the uniform administration and interpretation of this Agreement in connection with federal, state, and local wage-hour and wage parity statutes, all claims brought by either the Union or Employees, asserting violations of or arising under the Fair Labor Standards Act ("FLSA"), New York Home Care Worker Wage Parity Law, or New York Labor Law (collectively, the "Covered Statutes"), in any manner, shall be subject exclusively, to the grievance and arbitration procedures described in this Article. The statute of limitations to file a grievance concerning the Covered Statutes shall be consistent with the applicable statutory statute of limitations. All such claims if not resolved in the grievance procedure, including class grievances filed by the Union, or mediation as described below shall be submitted to final and binding arbitration before Martin F. Scheinman, Esq. The Arbitrator shall apply appropriate law and shall award all statutory remedies and penalties, including attorneys' fees, consistent with the FLSA and New York Labor Law in rendering decisions regarding disputes arising under this Article.
2. Whenever the parties are unable to resolve a grievance alleging a violation of any of the Covered Statutes, before the matter is submitted to arbitration, the dispute shall be submitted to mandatory mediation. The parties hereby designate Martin F. Scheinman, Esq. as Mediator for such disputes. Such mediation shall be requested no more than thirty (30) calendar days following exhaustion of the grievance procedure. Following submission of the dispute to mediation, the parties with the assistance of the Mediator shall establish such procedures as shall expeditiously advance the mediation process, including the scheduling of the exchange of relevant information, submission of position statements, and dates for mediation. In the absence of agreement, the Mediator shall determine such procedures. Once the matter has been submitted to mediation, the Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Mediator. The fees of the Mediator shall be shared equally by the Union and the Employer.
3. No party may proceed to arbitration prior to completion of the mediation process as determined by the Mediator. In the event the Union seeks arbitration of a

grievance subject to these procedures, the Union shall submit its demand for arbitration to the Employer and the Arbitrator within four (4) months following the Mediator's declaration that mediation has concluded. The Employer shall be obligated to produce relevant documents as requested by the Union and any objections to production shall be ruled on by the Arbitrator. Prior to hearing, if noticed, the Union shall also be entitled to depositions of relevant witnesses. The fees of the arbitrator shall be shared equally by the Union and the Employer. The Employer shall upon notice be entitled to take the deposition of any Employee seeking relief in such arbitration or any other relevant witness.

4. In the event an Employee has requested, in writing, that the Union process a grievance alleging a violation of the Covered Statutes and the Union declines to process a grievance regarding alleged violations of the Covered Statutes, through the grievance/mediation process or to arbitration following the conclusion of mediation, an Employee solely on behalf of herself, may submit her individual claim to mediation, or following the conclusion of mediation, to arbitration. Written notice of the Employee's submission of the dispute to mediation and/or arbitration must be provided to the Employer, the Union, and the Mediator/Arbitrator within thirty (30) calendar days of written notice from the Union, as measured by postmark date, email date, facsimile date, or delivery/attempted delivery date (if such notice is served by overnight delivery service), that it has declined to process the dispute to mediation and/or arbitration. Such claims may be presented by and on behalf of the individual Employee only, with or without counsel. The Mediator/Arbitrator shall have no authority to consider class or collective claims or issue any remedy on a class basis. The fees and expenses of the Mediator/Arbitrator shall be shared equally by the employee and the Employer, unless the arbitrator finds a violation of any of the Covered Statutes, in which case the Employer shall pay the fees and expenses of the Arbitrator.

5. The parties agree not to contest court confirmation of an arbitration award rendered under this Article. Nothing herein shall require the Union or the Employer to indemnify the other party with respect to any finding by an arbitrator and/or court of competent jurisdiction that the Employer has violated any of the Covered Statutes.

6. All payroll and time records exchanged by the parties (i.e. Union, Employer or individual Employee) in mediation shall be deemed admissible in arbitration. All other information exchanged in mediation shall be deemed offered as part of a settlement negotiation and, pursuant to the Federal and New York State Rules of Evidence, shall not be admissible in any subsequent proceeding.

New Article __ in the CBA, "Ratification"

1. This MOA is subject to ratification by the Union and its membership and by the Board of Directors of the Employer.

2. This Agreement is also subject to approval by the New York City Human Resources Administration.

1199SEIU UNITED HEALTHCARE
WORKERS EAST

CHINESE-AMERICAN PLANNING COUNCIL
HOME ATTENDANT PROGRAM, INC.

By: Rona Shapiro

By: [Signature]

Date: 12/7/2015

Date: Dec 4, 2015

Exhibit 13

**Petition for Review, *Matter of
Chinese Staff and Workers
Association v. Commissioner of Labor***

December 8, 2017

**STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS**

In the Matter of the Petition of:

CHINESE STAFF AND WORKERS ASSOCIATION,
NATIONAL MOBILIZATION AGAINST SWEATSHOPS,
and IGNACIA REYES,

Petitioners,

To review under Section 657 of the Labor Law:
Wage Order for Miscellaneous Industries and Occupations,
effective October 6, 2017,

- against -

THE COMMISSIONER OF LABOR,

Respondent.

PETITION FOR REVIEW
OF THE WAGE ORDER
FOR MISCELLANEOUS
INDUSTRIES AND
OCCUPATIONS

CHINESE STAFF AND WORKERS ASSOCIATION
345 Grand Street, Unit 1W
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Dated: December 8, 2017

**Admitted as an attorney in the State of Georgia*

PRELIMINARY STATEMENT

1. The Industrial Board of Appeals should set aside the emergency regulations issued by the Labor Commissioner and published on October 25, 2017, which amend the Wage Order for Miscellaneous Industries and Occupations. N.Y. Reg., Oct. 25, 2017 at 5-7 (“Emergency Wage Order”).

2. The Minimum Wage Act mandates that every employee be paid not less than the statutory minimum wage for each hour worked. N.Y. Lab. Law § 652. However, the Emergency Wage Order creates an express exception for “home care aides,” who under the emergency regulatory scheme are no longer entitled to be paid for meal times and sleep hours when working shifts of 24 hours or more.

3. For the reasons set forth below, the Emergency Wage Order should be set aside because it violates the Minimum Wage Act, it is outside the scope of the Labor Commissioner’s powers, and it usurps legislative power in violation of separation of powers principles.

4. Although “home care aide” is not defined in the Emergency Wage Order, that term has been defined by the New York Home Care Worker Wage Parity Act to mean:

a home health aide, personal care aide, home attendant, personal assistant performing consumer directed personal assistance services...or other licensed or unlicensed person whose primary responsibility includes the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks...

N.Y. Pub. Health Law § 3614-c (McKinney).

5. Home care aides deliver crucial services to many New Yorkers with disabilities, enabling them to maintain their independence in the community. These services include personal care services, which provide some or total assistance with personal hygiene; dressing and feeding; nutritional and environmental support functions such as assistance with toileting,

walking, transferring, and other tasks where such activities are essential to the maintenance of the patient's health or safety in his or her own home. See N.Y. Soc. Serv. Law § 365-a(2)(e).

6. Despite holding primary responsibility for the delivery of these vital and life-changing services, approximately fifty-four percent of home care aides are on some form of public assistance, in no small part because their wages are so low. See Workforce Data Center, <https://phinational.org/policy-research/workforce-data-center/#states=36&tab=State+Data&natvar=Earnings&var=Public+Assistance> (last accessed December 5, 2017). From 2004 to 2014, wages for home care workers in New York actually decreased. Home Health Aide Wages, <https://phinational.org/advocacy/home-health-aide-wages/> (last accessed December 5, 2017). Almost twenty percent of home care aides in the state have incomes that are below the federal poverty line; fifty-one percent have incomes that are less than 200% of the federal poverty line. Workforce Data Center, <https://phinational.org/policy-research/workforce-data-center/#states=36&tab=State+Data&natvar=Earnings&var=Poverty> (last accessed December 5, 2017).

7. By taking away the right of home care aides to be paid for all of their hours worked, the Emergency Wage Order further depresses the already bleak financial picture for many of New York's home care workers.

8. The Emergency Wage Order therefore directly contravenes the Minimum Wage Act, which is targeted to eliminate the employment of persons at "wages insufficient to provide adequate maintenance for themselves and their families." N.Y. Lab. Law § 650.

9. The Emergency Wage Order is also beyond the scope of the Commissioner's powers, whose mandate permits only those actions taken to effectuate the purposes of the Minimum Wage Act. N.Y. Lab. Law § 659(2); Rocha v. Bakhter Afghan Halal Kababs, Inc., 44

F. Supp. 3d 337, 354 (E.D.N.Y. 2014). The Commissioner has promulgated the Emergency Wage Order ostensibly “to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home.” These conclusory justifications are without basis in fact and do not present a real emergency necessitating these regulations. The Commissioner has thus usurped the authority of the state legislature in direct violation of the separation of powers doctrine. Accordingly, the IBA should annul the Emergency Wage Order.

PETITIONERS

10. Chinese Staff and Workers Association (“CSWA”) was founded in 1979 and is the first contemporary workers’ center to bring together workers across trades to fight for change in the workplace as well as in the community-at-large. Based in New York City, CSWA has a membership of over 1,300 workers from various trades and ages, including members who are employed as home care aides such as Xian Wen Zhen, Hui Ling Chen, and Xiao Huan Yu, have been aggrieved by the Emergency Wage Order. As such, CSWA has standing to bring this petition because it is an organization representing workers aggrieved by this Wage Order.

11. National Mobilization Against Sweatshops (“NMASS”) is a workers’ membership organization that was founded by young working people in 1996 in New York City. Many of its members are employed as home care aides whose rights to receive the minimum wage have been affected the Wage Order. As such, NMASS has standing to bring this petition because it is an organization representing workers aggrieved by this Emergency Wage Order.

12. Petitioner Ignacia Reyes has worked as a home attendant since approximately 1995, working 24-hour shifts. Declaration of Ignacia Reyes (Exhibit A) at § 2. Until approximately five weeks ago, her employers have paid for only the first 12 hours of every shift,

even though she was only able to sleep three to four hours each night due to the need to care for her patient. Id. at §§ 4, 7, 14-19. When she eats meals she is constantly on alert for her patient's needs. Id. at § 20. Approximately five weeks ago, her employer began paying her for 13 hours of work. Id. at §§ 6-8.

FACTUAL BACKGROUND

13. On October 25, 2017, the Commissioner published the Emergency Wage Order challenged by this action, which amended Sections 142-2.1(b), 142-3.1(b) and 142-3.7 of Title 12 NYCRR, also known as the Wage Order for Miscellaneous Industries and Occupations.

14. These amendments followed three decisions issued by the New York State Appellate Divisions for the First and Second Departments that did not afford deference to a March 2010 opinion letter issued by the New York State Department of Labor (“NY DOL”), which home care employers argued allowed employers to pay workers for only 13 hours of a 24-hour shift. Each Court concluded that this opinion letter conflicted with the plain language of the Wage Order then in effect. See Tokhtaman v. Human Care, LLC, 149 A.D.3d 476, 477 (1st Dept 2017), motion to reargue and for leave to appeal denied, Andryeyeva v. New York Health Care, Inc., 153 A.D. 3d 1216, 61 N.Y.S. 3d 280, 282-283 (2d Dept. Sept. 13, 2017), Moreno v. Future Care Health Services, Inc., 153 A.D.3d 1254 (2d Dept. Sept. 13, 2017).

15. Prior to the Emergency Wage Order, Section 142-2.1(b) of the Wage Order provided:

[t]he minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer...However, a residential employee – one who lives on the premises of the employer – shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.

12 NYCRR §§ 142-2.1(b), originally promulgated as Minimum Wage Order 11 (1960), and published at NYCRR, Supplement 15 (1963) at 344-64.

16. The NY DOL issued an opinion letter in March 2010, advising that “live-in employees,” whether or not they are “residential employees,” must not be paid for less than thirteen hours per twenty-four hour period provided that they are afforded at least eight hours of sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals. NY DOL, Op. No. RO-09-0169 at 4 (March 11, 2010). Many employers in the home care industry paid home health aides assigned to 24-hour shifts for only 13 out of every 24 hours worked based on the employers’ interpretation of the NY DOL’s opinion letter.

17. In or around 2011, home care workers filed lawsuits in New York State Courts. The Plaintiffs in these suits argued *inter alia*, that, as non-residential employees, they must be paid for all hours worked and all hours they were required to be ready and available to work, including the entire 24 hours that they were required to remain on-site at their charges’ homes. These plaintiffs alleged that their employers had violated the New York Labor Law by failing to pay them for all 24 hours of their shift, and asserted that they did not fall within the exception carved out in Section 142-2.1(b) of the Wage Order for residential employees who “live[] on the premises of the employer” and are not deemed “available for work” during their regular sleeping hours.

18. Three cases reached the Appellate Division on the question of whether the DOL’s opinion letters were entitled to deference: Tokhtaman v. Human Care, LLC, 2016 WL 4439990 (N.Y.Sup.), 2016 N.Y. Slip Op. 31606(U) (denying defendants’ motion to dismiss), aff’d, 149 A.D.3d 476 (1st Dept 2017), rev’d 2017 WL 5616020 (dismissing defendants’ motion for leave to appeal); Andryeyeva v. New York Health Care, Inc., 45 Misc. 3d 820, 994 N.Y.S.2d 278

(N.Y. Sup. 2014) (granting plaintiffs’ motion for class certification), *aff’d*, 153 A.D.3d 1216, 61 N.Y.S.3d 280 (N.Y. App. Div. 2017); Moreno v. Future Care Health Services, Inc., 2015 WL 1969753 (N.Y.Sup.) (denying plaintiffs’ motion for class certification), *vacated*, 153 A.D.3d 1254, 61 N.Y.S.3d 589 (2d Dept Sept. 13, 2017).

19. The First Department found that NY DOL’s regulatory construction articulated in its opinion letters conflicted with the plain language of the then-existing provision of the Wage Order because it failed “to distinguish between ‘residential’ and ‘nonresidential’ employees.” Tokhtaman, 149 A.D.3d at 477. The Court therefore held that “if plaintiff can demonstrate that she is a nonresidential employee, she may recover unpaid wages for the hours worked in excess of 13 hours a day.” *Id.*

20. Expressly adopting the reasoning of the First Department, the Second Department similarly held that home care workers who were not “residential,” “were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals.” Andryeyeva, 61 N.Y.S. 3d at 282-283; Moreno, 61 N.Y.S. 3d. at 591.

21. The Second Department held that, because the plaintiffs in question “were required to be at their clients’ residences and were also required to perform services there if called upon to do so,” “[t]o interpret [12 NYCRR 142-2.1] to mean that the plaintiffs were not, during those nighttime hours, ‘required for to be available for work’ simply because it turned out that they were not called upon to perform services is contrary to the plain meaning of ‘available.’” Andryeyeva, 61 N.Y.S. 3d at 282-283.

22. Due to the procedural posture of the cases before the First and Second Departments, no appeal to the Court of Appeals is likely to be certified. See Tokhtaman v.

Human Care, LLC, 2017 WL 5616020 (motion for leave to appeal dismissed upon ground that order sought to be appealed from did not finally determine the action). Therefore, prior to the issuance of the Emergency Wage Order, all Appellate Courts to consider the issue concluded that all home care aides, particularly those assigned to 24-hour shifts, must be paid for all hours worked.

23. On October 6, 2017, the NY DOL initiated an emergency rulemaking process under the State Administrative Procedure Act to promulgate the Emergency Wage Order.

24. Pursuant to this purported emergency process, Section 142-2.1(b) now provides that:

[t]he minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed the employer...However, a residential employee – one who lives on the premises of the employer – shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment. *Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.*

12 NYCRR 142-2.1(b) (emphasis added).

ARGUMENT

I. The Order Is Contrary to the New York Labor Law.

25. In relevant part, the Emergency Wage Order provides that:

this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as

amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.

12 NYCRR 142-2.1(b).

26. The IBA should annul the Emergency Wage Order because it is in violation of the New York Labor Law.

27. The Minimum Wage Act requires that employees be paid at least the statutory minimum wage for each hour worked. N.Y. Lab. Law § 652.

28. New York Courts have defined work under the New York Labor Law coextensively with the definition of work under the Fair Labor Standards Act (“FLSA”). McElroy v. City of New York, 50 Misc.2d 223, 225 (Sup. Ct. Kings Cty. 1966) (citing Tennessee Coal, Iron & R. Co. at 321 U.S. 590, 598).

29. The United States Supreme Court has long defined work under the FLSA to “includ[e] all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 690-691 (1946); see also Integrity Staffing Solutions, Inc. v. Busk, 135 S.Ct. 513, 516 (2014).

30. The U.S. Supreme Court has further defined work to mean “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” Tennessee Coal, Iron & R. Co. v. Muscoda Local No., 123, 321 U.S. 590, 598 (1944); also Reich v. Southern New England Telecomm. Corp., 121 F.3d 58, 64-65 (2d Cir. 1997).

31. Even if an employee does nothing but wait, that time may nevertheless be compensable work time if undertaken for the benefit of the employer. Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944) (“Readiness to serve may be hired, quite as much as service

itself, and time spent lying in wait for threats to the safety of an employer's property may be treated by the parties as a benefit to the employer."); Reich at 64 (citing Armour at 133-134) ("[T]ime spent waiting for an event to occur...may constitute work if an employer hired an employee for that function.").

32. "In applying the predominant benefit test, the Court must distinguish between 'employer requirements that substantially hinder an employee's ability to use the time freely and those requirements that place only a minimal burden on the employee's use of time.'" Andryeyeva v. New York Health Care, Inc., 45 Misc. 3d at 832, 994 N.Y.S.2d at 288 (N.Y. Sup. 2014) (citing Singh v. City of New York, 524 F.3d 361, 368 (2d Cir.2008)).

33. In fact, the NY DOL has previously stated its opinion that time during which employees await the need for immediate performance of their assigned duties is "on call," working time. See NY DOL, Op. No. RO-09-0023 at 2 (March 1, 2009) ("'[O]n call' time is considered working time... 'On-call' time is time during which an employee is not free to leave or engage in personal pursuits, and is awaiting the need for the immediate performance of their assigned duties."); NY DOL, Op. No. RO-09-0169 at 4 (March 11, 2010) ("'On call' time is that time during which employees are required to remain at the prescribed workroom or workplace, awaiting the need for immediate performance of their assigned duties. Employees who are 'on call' are considered to be working during all the hours that they are confined to the workplace including those hours in which they do not actually perform their duties.").

34. Therefore, under controlling case law and longstanding NY DOL opinion letters, employees who are required to remain at the job site for the predominant benefit of the employer are deemed to be working within the meaning of both the FLSA and New York Labor Law, irrespective of the actual tasks demanded of them. See Reich, 121 F.3d at 65-66 (finding that

even workers who “are not compelled by ‘the nature of their work’ to remain at the job site but are required to do so by their employer, on pain of discipline, for the purpose of providing important (albeit non-taxing) security, maintenance and safety services” are working within the meaning of the FLSA); Andryeyeva, 153 A.D.3d 1216, 61 N.Y.S. 3d at 282 (finding that non-residential home health aides were entitled to be paid the minimum wage for all 24 hours of their shifts “regardless of whether they were afforded opportunities for sleep and meals”); Herman v. Palo Group Foster Home, Inc., 976 F.Supp. 696, 702 (W.D. Mich. 1997) (“work which requires an employee to ‘sleep with one eye and one ear open’ to ensure the safety and well-being of residents of a health care facility is clearly compensable labor.”) (citing Hultgren v. County of Lancaster, 913 F.2d 498 (8th Cir. 1990)).

35. The nature of the work performed by home care aides necessitates their continued presence in care recipients’ homes, which is naturally also for the benefit of their employer. Indeed, the New York State Department of Health (“NY DOH”) certifies care recipients to be assigned 24-hour care services only when it is anticipated that the care recipient will need assistance throughout a calendar day. 18 NYCRR § 505.14(a)(4). Home care aides assigned to 24-hour shifts are therefore, by the nature of their work, required to be on call during meal and sleep breaks. Further, home care aides are required to remain on the job site during all sleep breaks, and leaving their charges unattended for any period of time would constitute a dereliction of duties that could result in disciplinary action.

36. The Emergency Wage Order attempts to flout the Minimum Wage Act by incorporating by reference two regulations interpreting the FLSA, found at 29 C.F.R. §§ 785.19 and 785.22, which exclude meal periods and sleep times from hours worked by home care aides

who work shifts of 24 hours or more and exempts their employers from having to pay the minimum wage for those hours.

37. Section 785.19 states that bona fide meal times are not work time. 29 C.F.R. § 785.19(a). It further states that “[t]he employee must be completely relieved from duty for the purposes of eating regular meals.” Id. “It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.” 29 C.F.R. § 782.19(b).

38. However, the Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Courts of Appeals that have considered the issue have all declined to afford Chevron deference to Section 785.19 because it fails to incorporate the predominant benefits test. See, Havrilla v. United States, 125 Fed. Cl. 454, 464 (2016) (collecting cases and rejecting Section 785.19 to conclude that plaintiffs were entitled to compensation during their meal break because the undisputed facts established that plaintiffs were required to spend their entire shift, including their half-hour “meal break,” engaged in activities that predominantly benefitted their employer); Reich, 121 F.3d at 64 (“§ 785.19, as literally construed, fails to persuade us primarily because the completely-removed-from-duty standard is inconsistent with controlling Supreme Court precedent defining ‘work.’”).

39. Section 785.22 similarly fails to incorporate the predominant benefits test required for determining the compensability of “on call” time. Instead, Section 785.22 permits an employer “to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked” from the pay of workers assigned to 24-hour shifts without considering whether the time is spent on the job site predominantly for the benefit of the employer. 29 C.F.R. § 785.22(a).

40. Petitioner Reyes and the aggrieved members of Petitioners CSWA and NMASS are home health aides who have been and will continue to be assigned to 24-hour shifts. When working these shifts, their principal job assignment is to provide round-the-clock care to their care recipients. Thus, even if they have an opportunity to take meals or sleep, they must always be ready to respond to the needs of their care recipients and are not permitted to leave their job sites. They are required to spend the entirety of their shifts on the job site predominantly for the benefit of the employer. Therefore, meal periods and sleep time are compensable work time under the New York Labor Law.

41. Because these restrictions on the movement and freedom of Petitioners and other home care aides during any meal and sleep time that they may receive are for the predominant benefit of the employer, meal times and sleep periods are compensable work time that, pursuant to the Minimum Wage Act, must be compensated at or above the minimum wage rate. N.Y. Lab. Law § 652.

42. As the Emergency Wage Order impermissibly converts the compensable meal periods and sleep time of home care aides into noncompensable time, the IBA should annul the Emergency Wage Order.

II. The Emergency Order Also Violates the Separation of Powers Doctrine.

43. The New York Constitution vests the legislative power of the state exclusively in the senate and assembly. N.Y. Const., art. III, § 1. Courts routinely strike down administrative actions that are not statutorily authorized delegations of legislative authority as violations of the constitutional separation of powers doctrine. Boreali v. Alexrod, 71 N.Y.2d 1, 11 (1987); also Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City

Dept. of Health & Mental Hygiene, 23 N.Y.3d 681, 692–693, 992 N.Y.S.2d 480, 16 N.E.3d 538 (2014).

44. In Boreali v. Axelrod, the Court of Appeals articulated four factors to be considered when “determining whether agency rulemaking has exceeded legislative fiat.” Leadingage New York, Inc. v. Shah, 153 A.D.3d 10, 17–18, 58 N.Y.S.3d 651, 657–58 (N.Y. App. Div. 2017) (citing Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv., 27 N.Y.3d at 178, 32 N.Y.S.3d 1, 51 N.E.3d 512); Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene, 23 N.Y.3d 681, 692–693, 992 N.Y.S.2d 480, 16 N.E.3d 538 (2014).

The factors to be considered are whether:

- (1) the agency did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems;
- (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance;
- (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and
- (4) the agency used special expertise or competence in the field to develop the challenged regulation.

NYC C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation & Historic Pres., 27 N.Y.3d 174, 179–80, 51 N.E.3d 512, 517 (2016).

45. However, the Boreali factors are not to be applied rigidly. Id. They “are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency’s exercise of power.” Greater N.Y. Taxi Assn., 25 N.Y.3d at 612. Indeed, “[t]he ‘central theme’ of a Boreali analysis is that ‘an administrative agency exceeds its authority when it makes difficult choices between public policy ends, rather than finds means to an end chosen

by the legislature.” Leadingage New York, Inc. v. Shah, 153 A.D.3d at 17–18 (citing Matter of New York Statewide Coalition of Hispanic Chambers of Commerce, 23 N.Y.3d at 700). “It is the province of the people’s elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends.” Matter of New York Statewide Coalition of Hispanic Chambers of Commerce, 23 N.Y.3d at 697; also NYC C.L.A.S.H., Inc. 27 N.Y.3d at 179–80.

46. In this case, the Emergency Wage Order clearly exceeds the DOL’s proper exercise of power. The powers of the Labor Commissioner are limited to taking action to “eliminate[] as rapidly as possible” the employment of persons at “wages insufficient to provide adequate maintenance for themselves and their families” that “threaten[] the health and well-being of the people of this state.” N.Y. Lab. Law § 650; Rocha v. Bakhter Afghan Halal Kababs, Inc., 44 F. Supp. 3d 337, 354 (E.D.N.Y. 2014).

47. However, the stated purpose of the Emergency Wage Order is to:

preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions for the First and Second Departments that treat meal periods and sleep time by home care aides as hours worked for the purposes of state (but not federal) minimum wage.

NY Reg, Oct. 25, 2017 at 6. In its regulatory impact statement, the NY DOL further elaborates that “[e]mergency adoption of this regulation is necessary for the preservation of the public health, safety, and general welfare to ensure that home care aides will be available to provide care for, and avoid the institutionalization of, those who rely on home care.” Id. at 7.

48. Applying the first Boreali factor, it is clear that the NY DOL “did more than balance costs and benefits according to preexisting guidelines, but instead made value judgments

entailing difficult and complex choices between broad policy goals to resolve social problems.”
NYC C.L.A.S.H., Inc., 27 N.Y.3d at 179-180.

49. As previously discussed, the Minimum Wage Act requires the payment of wages for all hours worked. No exception for home health aides appears in the law. Here, though, the NY DOL has issued an emergency regulation that fundamentally contravenes the purpose and language of the New York Labor Law in order to address the purported “collapse of the home care industry”. NY Reg, Oct. 25, 2017 at 5.

50. In so doing, the NY DOL has “constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns,” which is a hallmark of administrative overstepping. Boreali, 71 N.Y.2d 1 at 11-12; also NYC C.L.A.S.H., Inc., 27 N.Y.3d at 181.

51. Applying the second Boreali factor, the NY DOL did not merely fill in details of a broad policy, but instead, created its own comprehensive set of rules by specifically singling out home health aides and compensable work performed by them, without the benefit of legislative guidance. Moreover, the NY DOL completely ignored judicial interpretation of the Minimum Wage Order, which found that home health aides should be paid for all compensable work time so long as they are non-residential employees. See Tokhtaman v. Human Care, LLC, 149 A.D.3d 476, Andryeyeva v. New York Health Care, Inc., 153 A.D. 3d 1216, Moreno v. Future Care Health Services, Inc., 153 A.D.3d 1254.

52. Because of the speed at which the NY DOL intervened, the legislature has not had the opportunity to attempt to reach an agreement on the issue. Therefore, the third Boreali factor does not pertain in this case. The fourth Boreali factor, though, clearly weighs against the regulation.

53. Nothing about the stated purpose of the Emergency Wage Order implicates the particular expertise of the Labor Commissioner to make modifications or additions to existing regulations or wage orders “to ascertain whether the minimum wages established in accordance with the provisions of [the Minimum Wage Act] are sufficient to provide adequate maintenance and to protect the health.” N.Y. Lab. Law § 653(1); also N.Y. Lab. Law §§ 654, 659.

54. In fact, the Emergency Wage Order is an abrogation of the Labor Commissioner’s powers and duties because the Order itself threatens the health and well-being of home care aides by attempting to convert compensable work time into noncompensable time and further depresses the earnings of workers whose wages already fall below 200% of the federal poverty line. Home Health Aide Wages, <https://phinational.org/advocacy/home-health-aide-wages/> (last accessed December 5, 2017).

55. To the extent that any agency is properly empowered to promulgate rules to avoid the collapse of the home care industry and the institutionalization of those who rely on home care, it would be the New York State Department of Health (“DOH”).

56. The home care program in New York State is primarily funded through the State’s Medicaid program, which is overseen by the DOH. See N.Y. Soc. Serv. Law §§ 363-a(1), 365-a(2)(d). The purpose of Medicaid is to enable participating states to furnish medical assistance to eligible individuals, including families with children and aged, blind, or disabled individuals whose incomes and resources are insufficient to meet the costs of necessary medical services. See 42 U.S.C. § 1396-1.

57. New York law vests authority in the Commissioner of DOH to adopt standards, including emergency regulations, regarding the provision of personal care services to ensure the needs of eligible individuals are met. See N.Y. Soc. Serv. Law § 365-a(2)(e). Petitioners are not

aware of any finding by the Commissioner of DOH regarding the delivery of personal care services or any purported need for emergency regulation such as those at issue in this Petition.

58. “[T]he Boreali factors do not constitute rigid conditions, all of which must be met in order for petitioners to prevail.” Matter of New York Statewide Coalition of Hispanic Chambers of Commerce, 23 N.Y.3d at 700. Therefore, satisfaction of three of the four Boreali factors is sufficient to show that the promulgation of the Emergency Wage Order exceeded the DOL’s proper scope of authority.

59. By taking actions purportedly aimed at preventing the collapse of the home care industry and the institutionalization of patients, the Labor Commissioner has arrogated the Legislature’s powers. For this reason, IBA should set aside the Emergency Wage Order as an improper exercise of the Labor Commissioner’s authority in violation of the separation of powers doctrine.

CONCLUSION

60. For the foregoing reasons, Petitioners respectfully request that the IBA enter an order (1) declaring that the Emergency Wage Order published on October 25, 2017, is contrary to law, null, and void and (2) granting any other relief deemed just or proper.

Dated: New York, NY
December 8, 2017

Respectfully submitted,

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***Admitted as an attorney in the State of Georgia*

Exhibit 14

New York State Department of Labor Sleep and Meal Times Regulation Hearing Transcript

July 11, 2018

Mario Musolino: Good morning everyone. Before we get started I want to explain our interpretation services for the day. This hearing will be interpreted live in multiple languages, English, Spanish and Chinese. We have headsets available for everyone. So if someone comes up who speaks one of those languages, just speak in your native language and folks will have interpretation. The headsets have different channels, so for English translation its channel 1, for Spanish translation its channel 2, and for Chinese translation it is channel 3. So channel 1 for English, 2 for Spanish and 3 for Chinese. So again, good morning, I'm Mario Musolino, the Executive Deputy Commissioner at New York State Department of Labor. On behalf of Governor Andrew Cuomo, Commissioner Roberta Reardon and the Labor Department, I want to welcome you to today's Hearing on sleep and meal time regulations in New York State. The Department of Labor works on behalf of both workers and businesses. We provide income support to workers who lose their jobs and we ensure that employees receive proper pay and work in safe environments. We help businesses find and maintain a skilled workforce and we provide them with no cost services designed to help them thrive in New York's growing economy. For nearly half a century New York State has followed federal regulations for home healthcare workers to exclude sleep and meantime under certain circumstances where employees work, sleep and eat at the same location. This has been in line with decades of case law and interpretation and consistent with other states. In 2017, court decisions threatened to destabilize the entire Home Healthcare industry and the foundation of its financial structure. This would lead not only to possible separation of workers many of whom are women and immigrants but also to the likely institutionalization of patients who could be cared for at home. In response, in October we stepped in with temporary emergency regulations codifying nearly 50 years of state orders and determinations consistent with well established federal standards governing 24 hour home care which have and will continue to protect workers. New York State has had and continues to have stronger overtime protections in the federal government for home healthcare workers. Today we are seeking input before adopting permanent regulations. During today's hearing, we will hear testimony on proposed regulations that clarify that hours worked may exclude meal periods and sleep times for employees who work shifts of 24 hour or more and this proposed rule would apply to all workers covered by the miscellaneous industry's wage order.

Let me introduce our panel members, we have James Rogers who is a Deputy Commissioner for Worker Protection. We have Ed Vargas who is our Director of Labor Relations and momentarily we expect to be joined by Nathaalie Cary our Deputy Commissioner of Administration and Chief Financial Officer, who is on Amtrak which is about 45 minute late today. As we stated online, testimony will be strictly limited to 3 minutes. And any folks who have attended one of our other hearings knows that we take that very seriously. The bell goes off at 3 minute and we call the next testifier. We will be calling testifiers in the order that you registered. Please come to the front table when your name is called. When you come up, if you have copies of your testimony, please provide it to Ramona. If you have to leave before your name is called, please give your testimony to the front desk where you checked in. Please begin your testimony when the light turns green. For those testifying you'll get a yellow warning light at 30 seconds left that will blink red when your time is up. Again, I want to thank everyone for taking the time to participate in today's hearing. I want to remind folks in the audience to please be respectful of

the speakers, try to keep the noise down and comments and things of that nature so the folks have a chance to make their points and be heard. So with that I think we're ready to begin. And our first testifier of the day is Andrew Koski. Andrew come on up and following Andrew will be LaDonna Lusher.

Andrew Koski: Good morning everybody my name is Andrew Koski, I'm the Vice President for Program Policy and Services of the Home Care Association of New York State. We're the primary association representing home care and Hospice providers and manage long-term care plans in New York State. We recognize the purpose of today's hearing is to discuss the 24 hour rule, I'm sorry the 13 hour rule or practice for not just home care aides but we're going to limit our testimony to home care aides because we present the home care industry. First, I just want to say that I think everybody would agree that we recognize home care aides are really the backbone of the long-term care system. I would think everybody in this room has experienced either themselves or a family member or friend who has been kept home because of a home care aide whether the person is on Medicaid or private pay. So I think we all value home care aides in very high esteem. As long-term patient care is almost exclusively dependent on Medicaid, both the funding and rules for home care service delivery are subordinate to state and federal dictates and payment levels. Therefore the practice of paying aides for 13 hours on living cases is dictated by longstanding Department of Labor and State Department of Health rules and methodologies authorizing and paying for these services. So a couple of my main points I want to make is the practice of delivering homecare has been subordinated and confirmed to the state and federal policies as I mentioned State DOL, State Department of Health and Fair Labor Standards Act. And that includes authorization and payment of aides for 13 hours on 24-hour living cases. Changing this policy especially without a commensurate shift in reimbursement levels and workforce supplies will adversely affect homecare providers and patients. Without such changes in reimbursement and workforce supply this policy must be maintained and codified. We want to emphasize that even under the standard, aides are not precluded from being paid for more than 13 hours if attending to the patient's needs results in them not getting 8 hours of sleep including 5 uninterrupted and 3 hours for meals. And our homecare agencies will train and provide information in writing to their aides that if they're not getting the 8 hours of sleep; 5 uninterrupted and 3 hours for meals they should document that and notify the agency and the agency will then take it from there and try to obtain two twelve hour shifts. So for many years these intensive homecare hour services have been structured upon this standard and deviation will trigger major and costly changes. State Medicaid fee for service rates and manage care rates compensate only up to the state mandated methodology and there's no policy provision or capacity under the Medicaid cap to pay for this. Even if the state agreed to reimburse agencies for 24 hours, agencies practices would have to change and patient care would suffer.

Mario Musolino: Thank you. Our next testifier is LaDonna Lusher followed by Marie Andreacchio. LaDonna.

LaDonna Lusher: Hi my name is LaDonna Lusher and I'm a partner at Virginia Ambinder, we're a labor and employment first, labor and employment law firm that represents hundreds of

homecare workers that work 24-hour shifts. I personally have spoken to many of these homecare workers and so have the individuals that I work with. These workers are required to stay in their clients homes for the entire 24 hour shifts and remain on duty and ready and available to provide care and assistance during all of the hours of their shift. Unlike every other worker in New York State who reports to their workplace, these workers are not paid for all of the hours that they work. This practice of failing to pay them for all of their hours is a gross violation of New York Labor Law which mandates that every employee be paid not less than the statutory minimum wage for every hour that they work. New York courts have recognized this and they've mandated that homecare workers who perform for 24-hour shifts are required to be paid for all 24 of those hours. Despite these unanimous holdings, this proposed regulation is really an attempt to manipulate New York Law and single out homecare workers from receiving minimum wages from all of the hours they're required to be at their workplace. It can't be disputed that home attendants are not free to leave their client's home at any point during the shift and that they have to be ready to assist the client at any moment. So in essence, they're on-call for all 24 hours. The Department of Labor has always interrupted on-call to mean time during which an employee is not free to leave or engage in personal pursuits, and awaiting the need for immediate performance of their assigned duties. And the DOL has always required that on-call work be paid. You'll hear from many home workers today who are going to testify that it was impossible for them to get 8 hours of sleep and 5 hours uninterrupted. Particularly considering that many of the clients that are assigned 24-hour care need 24-hour supervision and suffer from physical or mental infirmities that require them to be there and that the aide assist them at all times. They also cannot get 3 one-hour meal breaks duty free, uninterrupted to themselves. I don't even get that in my job. Despite their hard work and long hours, almost 20% of homecare workers in New York have incomes that fall below the federal poverty line and 51% have incomes that are less than 200% of the federal poverty line. As a result, more than half of homecare workers in New York receive some form of public assistance with 37% qualifying for and relying on Medicaid. The majority are also women of color and this regulation will put this vulnerable workforce further into poverty. The agencies that employ them, although the DOL says that they have to be paid for a minimum of 13 hours, the agencies that employ them have ignored that regulation and have just paid them a flat rate for all 13 hours and have not monitored the hours that they actually work. We urge the DOL to reject the proposed rule as it again will put these workers further into poverty and it is in direct contradiction to...

Mario Musolino: Thank you. Marie Andreacchio followed by Walter Kaltenbach. Is Marie here? Walter Kaltenbach. Is Walter here? No. Irene Castro. And Irene will be followed by Alexandra Holmstrom-Smith.

Irene Castro: Good morning and thank you for the opportunity to submit testimony for today's hearing. My name is Irene Castro and I am presenting testimony on behalf of Caitlin Connolly, Director of Social Insurance at the National Employment Law Project. Caitlin apologizes for not being in person. NELP is a nonprofit nonpartisan reach and advocacy organization specializing in employment policy. We are based in New York with offices across the country and we work on a wide range of workforce issues including those affecting homecare workers. NELP's work

has long included a special focus on improving conditions for homecare and domestic workers at the Federal, State and local level. NELP has litigated wage and hour cases on behalf of classes of homecare workers in New York. We work close with domestic work organization groups whose members work in homecare. New York homecare workers have seen their wages fall over the past decade both the median annual earnings at just \$18,000. The wages are so low that more than half live below 200% of the federal poverty level. This workforce, which is 93% women and 71% of color have long been exploited and excluded from many labor protections. We are here today to oppose this regulation which further exploits these workers and detracts from recent policy gains and labor rights victories. For the State of New York to tell caregivers who are required to remain at the worksite for the full 24 hours of their shift that they will only get paid for a portion of their work, is a step backwards in their fight for labor rights. At NELP we have heard the stories of workers who are not free to leave during breaks, who are unable to sleep and are required to be awake throughout the night, of workers who agency employers tell them they must work these shifts or not get work. These care workers have their own homes for which the pay rent and maintain. They may need to find childcare while they work overnight shifts. They're at work and yet you propose not paying them. These workers are committed to providing quality care to seniors and people with disabilities across New York but those supports should not come at the expense of their rights. Everyone deserves long-term services and supports that allow them to remain at home and within his or her community. The state should support policies that ensure people can access quality homecare without sacrificing the rights of workers. Thank you.

Mario Musolino: Thank you. Next is Alexandra Holmstrom-Smith. And Alexandra will be followed by Lisa Griffith.

Alexandra Holmstrom-Smith: Good morning my name is Alexandra Holmstrom-Smith I'm with the Community Development Project, a New York City based, nonprofit that provides legal services and advocacy to the City's most vulnerable residents. We are here today because we believe that the DOL's proposed changes are contrary to the letter and the intent of the minimum wage law. The changes fail to protect the rights of workers who are not residents of their employers and who were not intended to be excluded from the right to be paid for every hour they work. The proposed changes are not necessitated by any emergency, certainly not an emergency affecting the rights of workers that the DOL is charged with protecting. Mr. Koski stated earlier that the 13-hour payment practice is subordinated to Medicaid rules, which includes clearly that the solution is increasing Medicaid appropriations rather than cheating workers out of all of their wages. New York's homecare workers are among the state's most underpaid and vulnerable workers. As we've heard before, the median income is only \$18,000, 54% are on public assistance and when we count all of their hours in a 24-hour shift, homecare workers earn far below state and federal minimum wage. And again, the vast majority are women of color and immigrants and they are in special need of labor law protections in today's political climate. The DOL's unamended minimum wage order correctly protected nonresidential workers right to be paid for every hour worked. Its plain language stated that employees must be paid the minimum wage for the time an employee is required to be available for work at a place prescribed by the

employer. The exception was for a residential employee to find as one who lives on the premises of the employer. Both the first and second departments upheld this distinction and there is an important difference. Nonresidential workers arrive to perform work at the client's residence and every moment that they are there is time away from their homes and their families. They don't have their own rooms, they can't leave the worksite on breaks, and under those kinds of conditions it's extremely difficult for them to use any break time for their own purposes. And now even without distinguishing nonresidential employees, the DOL has never wavered from its position that if workers are not afforded the 8 hours of sleep, do not receive 5 uninterrupted hours of sleep and are not afforded 3 hours for meals, they must be paid for all 24 hours. And in truth, the vast majority of these workers do not receive these breaks and the homecare agencies have been ignoring the DOL's guidance on this matter by paying a flat fee for 13 hours only regardless of how much people are actually working, and that is a disregard for the rights of these workers and disregard for paying what they are owed and that is precisely why the DOL's guidance is so important at this time. Now the stated rationale for applying the emergency amendment was to protect, prevent the collapse of the homecare industry, that is the same argument they always make. We ask the DOL...

Mario Musolino: Thank you. Our next speaker is Lisa Griffith. Lisa here and followed by Jocelyn Lee.

Lisa Griffith: Good morning my name is Lisa Griffith I'm an attorney and shareholder at the law firm of Littler Mendelson. I'm here today on behalf of the Homecare Association of America representing more than 2500 member organizations throughout the US and New York and the Safe New York Homecare Coalition, a membership organization consisting of homecare providers in New York employing over 61,500 caregivers who serve over 56,000 patients. The regulation at issue as pertaining to homecare aide working living shifts is not regarding all shifts worked by homecare aides. A live-in shift means the aides run a shift for 24 hours or more for patients who do not require 24 hours of active duty care. The patients in question have been assessed and declared that they typically sleep through the night and the aide assigned to them can receive 3 hours of uninterrupted meals. If the consumer is not sleeping well on a regular basis and/or the aide does not receive 3 uninterrupted meals, the case is reassessed and may be reclassified such that the patient will be provided 2 aides working 12 hour split shifts for example. If the regulation is not made permanent, the homecare industry will collapse. Wages and benefits costs are the biggest factor in rising costs for homecare providers. If the regulation is not enacted, homecare aides will have to be paid for each hour of their 24-hour shifts which, with overtime will more than double what it currently costs to employ homecare workers. This is cost prohibitive for many private pay clients. In addition, most homecare patients served by New York agencies are Medicaid beneficiaries, Medicaid only reimburses for 13 hours of a live in shift. Agencies will likely continue to decrease the working hours of homecare workers and/or ceases employing them altogether thus negatively and financially impacting the livelihood of approximately 330,000 individuals employed in this state as homecare aides. As described by the labor commissioner this regulation is absolutely necessary to help ensure the stability and ongoing viability of these jobs. The loss of jobs is real. After the passage of the New York

_____ Parity law establishing a higher minimum wage of pay for homecare workers, 35% of home healthcare providers reduced the hours of direct care staff and approximately half of the providers reduced staff overtime. After the appellate division decision many agencies stopped accepting living cases. One of the most significant issues facing the home care agencies is the potential of back pay damages if the court of appeals upholds the erroneous _____ and Andrea Eva decisions. With New York's labor laws 6-year statute of limitations and the prevailing plaintiff that can recover prejudgment interest and attorney's fees and liquidated damages of 100 living homecare aides could present liability of over \$10 million or a staggering \$60 million in damages for these agencies and that's only for 100 of them. In addition, if the homecare industry collapses the elderly and disabled individuals will not be able to receive the care that they deserve and need. Thank you.

Mario Musolino: Thank you. Jocelyn Lee. And Jocelyn will be followed by Claudia Hammar.

Jocelyn Lee: Good morning, thank you for the opportunity to speak at this hearing. My name is Jocelyn Lee Executive Director for First Chinese Presbyterian Community Affairs Home Attendant Corporation. We are a New York State licensed agency established in 1979. We current employ homecare workers to provide homecare services to over 1000 homebound consumers residing in the 5 boroughs of the City. On behalf of the Board and senior Management the First Chinese I'm submitting to you our testimony to seek DOL's fierce intervention to stop the potential displacement of over 30,000 homebound frail and elderly consumers and the potential loss of jobs of over 60,000 homecare workers in the industry. I have provided you exhibits which I'm not going to read here but its reference on my testimony has been submitted. Recent decisions by 2 New York State appellate courts have called into question the New York State DOL's 13 hour rule which has converted how live in workers have been paid for years. As a result, First Chinese and at least 145 other homecare employers in New York State have been named in class action wage lawsuits. By plaintiff lawyers who are representing homecare workers who have worked in shifts. I have provided you that list. These claimants are seeking payment for wages of all 24 hours of their live-in shifts and there is a 6-year statute of limitation for unpaid wages under New York Law. In your reaffirming the 13-hour rule directing homecare workers to pay 13-hour wages for live in workers for work shift, they are afforded 8 hours of sleep including 5 hours of uninterrupted sleep and 3 hours of mealtime. This is because 2 New York State appellate courts and numerous lower courts have allowed claims for 24 hours of wages to proceed on a class action basis. Two courts have refused to require claimants to proceed individually with their wage claims in arbitration pursuant to the alternative disposition resolution procedures under agencies respective collective bargaining agreements stripping agencies of their contractual rights under their CBA. I have provided you a list of all the documents of the New York State Department of Health and the manner in which we are funded and if you are not going to give us a fair legislative intervention, this is the outcome of your not helping us. Homecare employers are going to have no choice but to file for bankruptcy and the loss of homecare services for all of our homebound consumers will result in homecare consumers being institutionalized in nursing homes which will increase the amount of Medicaid and Medicare spending for the care of the clients. And there is a loss of

vital services to the homebound consumers who would want to live their lives with independence and dignity, and of course, the loss of jobs to middle class workers. I have submitted my...

Mario Musolino: Thank you very much. Claudia Hammar followed by Lisa Burriss.

Claudia Hammar: Good morning. My name is Claudia Hammar and I'm President of the New York State Association of Healthcare Providers also known as HCP. HCP is a trade association representing approximately 350 offices of licensed homecare services agencies, certified home health agencies and health related organizations across the state. HCP supports the Department's longstanding guidance that allows sleep and meal times to be excluded under certain circumstances where employees work, sleep and eat at the same location. The Department's proposed regulation codifies the State's longstanding guidance, as well as federal regulations related to sleep and meal periods for home healthcare workers in 24-hour shifts. There are two fundamental issues related to payment for 24-hour shift for homecare workers. First and foremost, is the issue of paying aides for the hours they work in accordance to DOL's long-standing guidance? Homecare agencies that provide 24-hour care can provide care either by two 12-hour shifts or three aids that work 3 eight-hour shifts or some provide a live-in shift that is signed to be in the patient's home for all 24 hours but they are only supposed to be working for the 12 hours of that time period. During a live in shift, in accordance with DOL guidance, the aide is expected to receive 8 hours of sleep 5 of which are uninterrupted, 3 hours for meal periods. If a patient calls the aide for assistance during the aide's sleep or meal periods, such interruption is considered working time and therefore must be paid by the homecare agency. Home care agencies instruct their aides to report these hours worked and pay them accordingly and adjust the cases as needed. Homecare agencies have been adhering to these guidelines for decades. However the recent court decisions and the state Supreme Court and Reava Marino and Tut Common have ruled that aides must be paid for all 24 hours of a live-in shift. These decisions not only impact current 24 hour live-in cases but if upheld by the New York State Court of Appeals will bankrupt a significant number of homecare providers due to the liability imposed on Medicaid providers by the court resulting from this 6 year look back awarded to plaintiff's in these cases. DOL issued their emergency rule on payments for 24-hour shifts as a result of the implications of these court rulings on the homecare industry and consumer's access to homecare services. The Department's proposed regulations will now clarify that hours worked may exclude meal periods and sleep time for employees who work shifts of 24 hours or more with HCP supports. The second fundamental issue is the enormous cost t the state of paying homecare workers for all 24 hours of a live-in shift. The state's reimbursement structure related to Medicaid and its managed care system is not adequate to meet current obligations imposed by recent wage an hour mandates and it will never be able to withstand the amount of funds needed to pay workers for all 24 hours of a live-in shift. Furthermore, the cost would also be astronomical for non Medicaid, private pay homecare providers who would be unable to absorb a doubling of cost for these cases. The net result would be the end of 24 hour live-in cases, shifting the burden to nursing homes and other facilities that simply do not have the capacity to absorb all of these cases. The implication on the State's most vulnerable populations including disabled populations would be catastrophic. The uncertainty about the status of 24

hour live-in cases is already having an impact. Many homecare agencies have stopped providing these services and managed care plans are having difficulty placing 24 hours cases. If the proposed regulation is not adopted, HCP recommends first the state must immediately allocate emergency funding to managed care plans with guidance stating that the plans must provide full funding to homecare agencies providing 24 hour live in cases so they can pay those workers for all 24 hours. The state must also assume the financial obligation for Medicaid providers that have followed the state's 2010 13 hour rule in good faith and they're now being held liable for billions of dollars simply because they followed the state's guidance. HCP supports the Departments proposed regulation and...

Mario Musolino: Thank you. Next is Lisa Burris. Is Lisa here? Staci Henry. And Staci will be followed by Amanda Bransford.

Staci Henry: Good morning, my name is Staci I'm currently a home attendant and I'm here representing other home attendants. I've been a home attendant for over 8 years; I've been doing live-in shifts. I get underpaid. I take care of two patients at a time at a live-in shift. I did a 3 day just to get paid \$300. I can't survive on that. Nobody can survive on that. The things that we have to endure during a 24 hour shift is simply not just enough. You have agencies like the one I'm currently working with who don't provide even health benefits. If you're sick, you just have to take the day off with no pay which is ridiculous. I have devoted my whole entire time to these type of jobs because it's how I get my bills paid truthfully. It's what I go to school for so it's the experience I need but I have to work 2 and 3 agencies just to make a bill payment in the State of New York which is sad because at times you're taking care of patients on a 24 hour shift who have Alzheimer's. You do not sleep with those patients. They're up every hour on the hour and if you're only get paid for 13 hours, where is the time for you? How do you even get to shower? There's days when I can't take a shower or even turn my back to feed myself because my patient is going to wander off. I'm only getting paid for 13 hours out of 24 hours. You're telling me I need to get to a job on time to take care of a husband and a wife just for a flat rate line of what \$135, \$150 a day and then now they're telling you, you can't work more than 2 days of live-in because it's a new state regulation law so I only get to work 2 days with you so I have to go work with another agency for 2 days, where is my life? I'm still young. It doesn't make any sense that I'm sitting here working so hard to get nothing for it. I feel like its slavery. I'm getting pennies for such a hard task job. If it's so easy why don't you come from behind the counter and go do what I do in these houses. It's not an easy job. It's very unfair to us. I am a pregnant lady who is still working up until; I had an incident at my job. I was attacked by a patient. My job knows about it. Was verbally abused, I was racially abused all the agency does is remove you from that case and place somebody else there. There is no protection there. There is nothing. They sweep it under the rug and you're supposed to go back and say okay nothing happened. Now I'm not working I can't even get maternity leave for a job I've been with for 4 years, why? Because I haven't worked a case in 3 months because of my pregnancy. That's not my fault, that's you as a job. You guys can't place me nowhere but I've been here for 4 years full-time 24 hours taking under pay. It is unfair. They need to fix that for us as employers because its not benefiting us in no shape or way and you guys can't do our job.

Mario Musolino: Thank you. Amanda Bransford followed by Richard Blum.

Amanda Bransford: Hi, good morning my name is Amanda Bransford and I'm a staff attorney on the Workplace Justice Legal Team at Make the Road New York where we represent hundreds of low wage immigrant workers each year to enforce their labor and employment rights. Our membership includes both those who provide homecare service and those who depend on these services and we urge the Department of Labor to adopt regulations requiring these workers be paid for all 24 hours they work. Current DOL regulations allow homecare workers to be paid for only 13 hours of a 24 hour shift on the assumption that 11 of the 24 hours will be devoted to sleep or meals and will not entail working even though homecare workers are required to be present and available for their clients throughout their shift. The DOL's minimum wage order for the miscellaneous industries states that employees must be paid for all on-call time defined as that time during which employees are required to remain at the prescribed workroom or workplace awaiting the need for the immediate performance of their assigned duties. In opinion letters the DOL has previously provided guidance on homecare workers saying that employees must be paid for this time even if they are not actually called upon to perform their duties. The opinion letters distinguish between a worker being on-call or subject to call. An employee is on-call when he or she is not completely relieved from duty and cannot effectively use the time for his own purposes without restrictions. When workers are subject to call, on the other hand, they are free to leave and engage in personal pursuits and activities. A person subject to call may not be paid until actually called to duty. On-call time conversely must be considered to be part of the duties of the employee and must be paid accordingly. Homecare workers who must remain on the premises of their clients throughout the 24 hour shift ready to assist the client as needed and are not free to leave to engage in personal pursuits are on-call throughout the shift. They should be treated like any other worker in the state who is entitled to payment for all hours worked. Homecare workers provide an essential service upon which we all depend. They ensure the disabled and elderly people can maintain their health, safety and dignity while living within their communities instead of an institution. Despite this, homecare workers are among the most underpaid workers in the state and frequently work long hours for poverty level wages. Their median income is \$18,000 per year. Domestic workers have a long history of being excluded from US labor laws because of racism and the legacy of slavery. The majority of homecare work continues to be done by members of minority racial groups and the workforce is overwhelmingly female, about 90%. Domestic workers including homecare workers continue to be excluded from many federal workplace labor statutes and New York should continue to lead the way in reversing this as it did when it passed the Domestic Worker's Bill of Rights in 2010. We at Make the Road New York are concerned not only about our members who are homecare workers but also about our members who depend on their services and do not wish to be institutionalized. The homecare industry has complained that paying for each hour of a 24 hour shift would be too expensive and would cause the system to collapse. In fact the system is in danger of collapsing because of the failure to attract and retain homecare workers by paying them for all their hours. Homecare workers are proud to do difficult and vital work. They do not deserve to be treated worse than other workers in the state. They do not deserve regulations that

specifically discriminate against an overwhelming female and minority workforce. We strongly recommend that the DOL adopt permanent regulations assuring that homecare workers that work 24 hours shifts are paid for every hour.

Mario Musolino: Thank you. Richard Blum followed by Shirley Ranz. Blum I'm sorry and I know that.

Richard Blum: Good morning thank you Richard Blum from the Legal Aid Society. The Legal Aid Society opposes the regulation. It is the wrong solution to a very serious problem about funding. The correct solution is to make sure that the agencies that are responsible get together, figure out how to properly fund the agencies then in turn pay for and fully compensate the workers who are providing this incredibly critical service. Short changing the workers is not the solution neither is the solution to risk the ability of disabled people to stay in their homes in their communities in a most integrated setting. I want to emphasize two points today; so Legal Aid Society represents both consumers through health law unit and workers through it's employment law unit and the health law unit often relies on the testimony of workers to establish that people are in fact entitled to a greater level of service. The two points are 1) it is the industry claims that this rule is already what they've been following for years. In fact what we see is wide spread violation of this rule already. And that agencies systemically do not track; they either refuse or fail to keep track of the work that's done at night. This not only short changes the workers but it also hides the actual needs of the consumer and prevents them from getting a higher level of care. We also see retaliation for people who actually come forward and report their hours, people being taken off the assignment, not given other assignments so just sort of quietly fired in effect. More recently we heard at least one report of two workers who were told by their agency presumably in response to the emergency regulation; don't provide any assistance at night between 9:00 p.m. 8:00 a.m. let the, just call 9-1-1 or don't do anything. The workers, of course, did not follow that incredibly unethical and inhumane order and as a result they reported the hours and were fired. So the regulation is already being violated and it's already being handled in a way that is detrimental to both consumers and to workers. Second point, given the widespread cheating, this regulation solves nothing. The lawsuits, the class actions that are going forward will continue to go forward even if the Court of Appeals rules against the plaintiff's on the 24 hour per se issue even if the regulation is promulgated because there are practice violations just as the Morano case points out they were paid a shift rate. There was no attention whatsoever to the actual hours being worked. There was no recording to the actual hours being worked. The cases are going to go forward as class actions and liability will remain the disincentive for agencies to provide the service will remain because of the liability. The regulation solves no problem at all, the only solution is for the relevant agencies to get together and figure out how to solve the funding problem and to get the money to the agencies and in turn to the workers to make sure that these, as it has been pointed out repeatedly, these workers who are low income, mostly women of color many of them immigrant women of color, who are living below poverty, make sure that they get paid as the responsibility of the Department of Labor and in turn to make sure the consumers get to live in their homes and communities in the most integrated setting. Thank you.

Mario Musolino: Thank you. Shirley Ranz followed by Julia Battista.

Shirley Ranz: All these claims on behalf of crying bankruptcy really remind me of the when seatbelts were mandated and when airbags were mandated the auto industry claimed they were all going to go bankrupt. So I'm here on behalf of the National Organization for Women. I became the Domestic Worker's Taskforce as a result of my own personal experience in my family. My mother had Alzheimer's disease for 12 years and required homecare. She was first given 12 hour daily provided through one of their managed long-term care companies whose only concern is profit. As her disease progressed she was reassessed and qualified for a 24 hour coverage however when I learned that the attendant would only be paid for 13 hours of this shift, I could only wonder who would be willing to work a shift at half the minimum wage. I also wondered how could an attendant who might be awakened several times at night to administer to her patient, how could she work consecutive 24 hours shifts and still be alert. I feared for my parent's safety and did not want to be a party to what was clearly exploitation of mostly immigrant women so I declined the hours. I could do so because my brother was willing to sleep at my parent's home. A few years later my father developed Alzheimer's as well and required homecare as well. When he was added to the case, the home attendant who is now required to do twice as much work had got a wage increase of \$.50 an hour. Their workload was enormous. My mother died 5 months ago and the next day the managed long-term care company informed me that my 98-year-old father's hours would be cut from 12 to 8 hours a day. One year prior he had wandered from the home for several hours on a cold day. The police were called and fortunately their dog found him. He can barely speak, he is incontinent, recognizes no one except me but the long-term care company determined that he could be left alone. When I threatened to take legal action, the long-term care company sent a nurse to reassess him. She admitted that although he clearly could not be left alone the company was cutting back and would probably refuse her recommendation to restore the 12 hours which they in fact did refuse. A nurse from another long-term care company told me that 5 years ago he would have easily qualified for 24 hour coverage but now that her company would refuse. It was only when I requested a fair hearing that the managed long-term care company agreed to restore my father's coverage to 12 hours. Recently I was informed that the health insurance coverage provided by this company for the attendants was being reduced and that new hires would receive no health insurance. If the majority of home attendants were men, I am sure this blatant abuse of these workers would not be tolerated. Why are they not subject to the same labor laws as other workers?

Mario Musolino: Thank you. Julia Battista followed by Louis Majer.

Julia Battista: The Consumer Directed Personal Assistance Association supports the New York State Department of Labor make permanent the proposed regulation relating to payment of sleep and mealtime. These regulations provide an important clarification to decades worth of legal and regulatory precedence. Precedence that is crucial to New York's obligation to provide services for those of disabilities in the least restrictive setting possible as required by the 1999 Federal

Supreme Court's Olmstead decision. As the only organization in New York still representing the interests of fiscal intermediaries and consumes participating in the Consumer Directed Personal Assistance Program the Consumer Directed Personal Assistance Association of New York State represents 45 fiscal intermediaries and almost 40,000 seniors and people with disabilities who rely on CDPA to live successful independent lives in the community. The Supreme Court's Olmstead decision revolutionized the way states approached long-term care for people with disabilities. In this landmark decision, the court determined that states under Title 2 of the Americans with Disability Act must provide services for people with disabilities within the community at the least restrictive manner appropriate if they so desire. Just as Kinsburg in writing for the majority opinion established under Title 2 of the ADA States are required to provide community based treatment for persons with mental disabilities when the state's treatment professional determine that such placement is appropriate. The affected persons do not oppose this treatment and the placement can be reasonably accommodated. Live in 24 hour Consumer Direct Personal Assistance and Personal Care are critical services that allow New York to remain in compliance with this mandate. The State Department of Health built a homecare system that relied upon the Department of Labor's interpretation of law consistent with a Fair Labor Standards Act to provide much needed services to those who require live in services. Without the clarification offered by the proposed regulation, thousands of individuals in need of long-term supports and services will either have too few or no hours authorized by their managed long-term care plans and the ability for individuals receiving long-term supports and services to live in their own homes with their families will be jeopardized. Understanding how the proposed regulation interacts with the homecare system and CDPA requires only a cursory glance and New York State's Department of Health Regulatory definitions of live in CDPA and continuous CDPA. According to DOH, an individual is eligible for a live in 24 hour consumer directed personal assistance if that individual requires assistance during the calendar day with toileting, walking, transferring, turning and positioning, feeding homecare services and is sufficiently infrequent that 24 hour consumer productive assistance would likely obtain on a regular basis 5 hours of uninterrupted sleep. Conversely, consumers who require a frequency of care that would not allow their personal assistants 5 hours of uninterrupted sleep consistently do not qualify for live in 24 hour personal assistance. This is a managed long-term care...

Mario Musolino: Thank you. Louis Majer, Louis, Liz Vladeck, Liz Vladeck, Katie Deabler followed by Randi Seigel.

Katie Deabler: Good morning thank you for this opportunity to testify and urge the DOL to withdraw the proposed rule. This proposal devalues the labor of homecare aides who work 24 hour shifts and deserve to be paid for all of those hours. It will also diminish the quality of care that clients, who depend on homecare aides to live independently receive. I speak today on behalf of the National Center for Law and Economic Justice where I am a staff attorney. For more than 50 years NCLEJ has fought for the rights of low income people including low wage workers and people with disabilities. Among our clients are homecare workers in New York City and organizations who represent them. The proposed rule is a drastic departure from the basic requirements of the New York State Minimum Wage Act that every employee be paid not

less than the statutory minimum wage for each hour worked. It also undercuts the fundamental purpose of the act which is meant to eliminate the employment of persons at wages insufficient to provide adequate maintenance for themselves and their families. Currently under an emergency regulation, many homecare aides are paid for fewer hours than they work the proposed rule would make this circumvention of the Minimum Wage Act permanent. More than 160,000 work as homecare aides in New York City alone. They deliver crucial services to many New Yorkers with disabilities and the elderly, and they enable these individuals to maintain their independence in the community in lieu of institutionalization. Despite holding primary responsibility for the delivery of these vital services, many employees of the homecare industry financially struggle. In New York City a homecare aide's annual earnings average less than \$20,000. Approximately 26% of this population have incomes below the New York City poverty threshold and 37% receive food stamps. The proposed rule also drastically impacts a field that has traditionally employed more women than men. Within New York City more than 93% of homecare aides are female and they are disproportionately women of color. The proposed rule will only exacerbate and deepen racial and gender equality in New York. Homecare aides assigned to 24 hour shifts are by the nature of their work required to be on-call during breaks. Their principle job assignment is to provide round the clock care to their clients. In the course of our work NCLEJ has spoken to many of these workers and few actually receive sleep and meal breaks that the proposed rule imagines. The nature of the work necessitates workers continued presence in care recipient's homes, requiring workers to be away from their own homes and families with no control over how their time is spent for days at a time. since the notice of proposed rule making was published, we have heard from workers that employers have told them that while on 24 hour shifts they are not allowed to assist clients during the night. Workers are thus forced to choose between risking their jobs and letting their clients suffer. Homecare workers deserve fair pay and their clients deserve the round the clock care that they need to remain in their own homes and communities. Thank you.

Mario Musolino: Thank you. And as you can see Deputy Commissioner Carey was able to deal with Amtrak and make her way here today. Next we have Randi Seigel followed by Yanin Pena.

Randi Seigel: Good morning my name's Randi Seigel I'm a partner at Menette Phelps and Phillips and we represent the New York State Coalition of Managed Long-term Care and Case Plans. The coalition represents 22 provider sponsored not for profit managed long-term care plans that provides long-term care to over 135,000 elderly or disabled Medicaid beneficiaries across New York State. MLTC Plans are now responsible for providing reimbursement for the vast majority of Medicaid covered homecare services delivered in the state which includes the services of home health and personal care aides. We focus our testimony on the proposed rule as it relates to the aides who work 24 hour shifts. The coalition supports the proposed regulation as it merely clarifies and maintains the status quo that hours work may exclude meal periods and sleep times for employees who work 24 hour shifts or more. MLTC Plans, as you've heard, are reimbursed solely by New York State to provide homecare and personal care services which are by far the most utilized services in the MLTC benefit package. The state calculates plans rates based on current expenditures and accounts for live in aides being paid only 13 hours. Any

change in the amount that an aide needs to be paid would not be covered by the rates currently being paid to MLTC Plans resulting in the plans being significantly underfunded and unable to cover the costs of providing care to its needed members. The states have relied on the existence of this policy when providing funding to the MLTC. Plans are already receiving insufficient funds to cover the growing cost of care to meet the demands of a policy if the proposed rules are implemented, the state will have to come up with something close to a billion dollars that it does not have to pay for this care. Or, plans will phase an unfunded mandate that will jeopardize their sustainability and make it difficult to fund homecare agencies who staff these cases. Relatedly Medicaid beneficiaries could suffer as a result of this mandate. Without adequate funding to cover the cost of 24 hour care, beneficiaries may not have access to services resulting in more beneficiaries ending up in institution. The coalition urges the adoption of the proposed regulation and we thank you for the opportunity to provide testimony.

Mario Musolino: Thank you. Yanin Pena followed by Lai Yee Chan.

Yanin Pena: Good morning or good afternoon, my name is Yanin Pena and I'm an organizers representing National Mobilization Against Sweatshops a sponsor of the ANI Woman Campaign. I'm here today to testify in opposition to the sleep and mealtime regulations proposed by the New York State Department of Labor. For almost a year now I've been organizing alongside home attendants and they're some of the most devoted yet exploited workers I know. Listening to their stories and building relationships with many of them I've witnessed a common thread among most of these women. Many of them hail from very impoverished and violent unstable countries in Latin America and they came to this country hoping to give their families better lives. Some and almost all of them at one point or another work 24 hour shifts several times a week; some for decades at a time. In most, if not all of these cases, the patients they work with are gravely ill and bedridden and for them this meant suffering in silence in their patient's homes, running on minimal sleep without pay. Worse yet, these regulations are insidiously reinstituting slavery. As many home attendants describe these shifts as a prison they can't escape from. They're contractually bonded by agencies to stay with patients at all times during their shifts. They've sacrificed their health and families to provide quality care to their patients. Despite this, their work remains undervalued. The DOL regulations further reinforces this notion that homecare is unpaid work and that women, especially women of color are merely companions. Nothing could be further from the truth. Home attendants perform vital work. They're the lifeblood of the homecare industry. Without their life saving labor, many elderly and very ill people would languish in facilities away from their loved ones. Furthermore, these regulations threaten to harm patients and home attendants alike as some agencies have instructed home attendants ignore their patients after hours and sleep since they will not be paid for the night. If passed, these regulations threaten to consign thousands of women workers to a life of poor health, solitude and slavery. Beyond homecare these regulations have a negative impact that will be felt by workers across all sectors. Already we're seeing the negative impact in our work. One case, a restaurant worker was fired for refusing to work 36 hours. Such a ruling with promulgate wage slavery and compound a severe wage theft crisis that assault millions of workers annually. In the 19th Century we fought to

abolish slavery. In the 20th we won the 8 hour workday. Why is it that in the 21st Century we're fighting against 24 hours shift that are unpaid? Even more shameful is the fact that its happening under an administration that prides itself on championing women and immigrant rights. Such a law taints progressive values. If the New York State Department of Labor truly wants to stand on the side of workers, we call on you to rescind these emergency regulations and stop resisting the courts rulings. Demand insurance companies and home care agencies immediately comply with the court decisions, abolish the 24 hour workday, patients requiring 24 hours of care should be provided split shifts of 12 hours each to allow home attendants time to rest and patients time to receive proper care. Thank you.

Mario Musolino: Thank you. Lai Yee Chan followed by Mary Lister.

Lai Yee Chan: Hi, good morning everyone. My name is Chan Lai Yee. I work as CPC, I'm a homecare worker for more than 20 years for 8 hours so I have worked consecutively for 24 hours for 3 days in a week as a worker. I'm not a slave to the family, I have my own family. At the patient's home they don't provide the meals for us and we don't have a private room. In the long run the many hours which force me to complete my meals in advance so I bring my own meals to my patient's home. So because of that I never eat fresh food. I take care of an 80 something patient with stroke. He cannot move. He has swallowing problems and he has inconsistence problem so I have to turn the bed at night a couple of times so that I can sleep and a few times at night there is some abnormal situation because I have had to call 9-1-1 to send him to the ER so I work for 24 hours which has affected my mental health. When I was trying to rest at home I cannot sleep properly. When I hear any noise outside I will get up right away and I thought that it was the patient calling me. So my mental health, my body is greatly harmed by this job. In 2015 I sued the homecare company with other workers and last year there were a few litigations that has received court rulings and they just said the 24 hour shift, ah the workers should receiver 24 hour pay. So I thought that was the end of victory. However Department of Labor never help us and issued an emergency order to stop us saying that for the 24 hour shift, you cannot go home but they will only pay you 13 hour pay. The ruling is not helping the homecare workers who have become the modern slaves. Under this emergency order, CPC has openly asked us to don't pay attention to the patient after 9:00 p.m. If anything happens, if they fell we just call 9-1-1. And also I write my nighttime work shift in the report and send it to the company for these suppressions this should not be continued against the workers.

Mario Musolino: Thank you. Mary Lister and following that will be Ayo Arnold. Amold, I'm sorry.

Mary Lister: My name is Mary Lister and I am an organizer with the Justice for Homecare Workers through the Anti Women Campaign. I have also been a homecare worker for 5 years in Buffalo, New York. As you all may already know, this was the only hearing on this topic scheduled for the entire state. My friends drove with me over 7 hours so that we could be here to share our thoughts with you. It is possible that the DOL did not feel the need to schedule a hearing for Buffalo since in Buffalo split shifts are the norm. Patients requiring 24 hours of care

generally receive 3 shifts of care, 8 hours each. While we homecare workers in Buffalo certainly face problems of our own with regards to control of our time and adequate working conditions, we have not yet had to endure the form of exploitation that these workers have encountered as a result of their emergency legislation. There was no hearing scheduled for Buffalo or anywhere besides New York City and yet the proposed legislation to which this hearing pertains would undoubtedly pertain to the whole state. If there were to be a hearing in Buffalo you would know that the homecare workers and the people with disabilities who rely on these services will not accept a rollback on our rights. Buffalo is a stronghold of the independent living movement and I have personally spoken with several self-advocate leaders there who are appalled to learn of the conditions in New York City and of the role that the emergency legislation has played in perpetuating this conditions, these self-advocates agree that the DOL must act now. There is also a vibrant and growing movement of homecare workers in the Western New York region. In fighting for better pay, control of our hours, and conditions of our employment, we recognize how key it is for ever hour of homecare to be properly valued and compensated. We have come too far to go back to the days of societal neglect of people with disabilities and of forced unpaid labor of working class people. The homecare community of Buffalo will not sit idly by if our rights are threatened. We will however welcome with open arms the opportunity for the DOL to stand with homecare workers and patients of New York City and of the State as a whole, by honoring the Courts prior decisions that prove to the 13 hour rule unlawful. If eight hour shifts for 24 hour cases are possible in Buffalo, then 12 hour or shorter shifts can be made the norm here. Thank you for your time.

Mario Musolino: Thank you. Ayo Arnold, followed by Xiao Huan Yu.

Ayo Arnold: My name is Ayo Arnold and I'm speaking on behalf Ignacia Reyes who notable cannot appear because she was scheduled a 24 hr shift and her relief did not make it. I submit this comment on the New York Department of Labor Rule hours worked 24 hour shifts proposed April 25, 2018. I oppose this proposed rule and urge the DOL to withdraw it. The proposed rule is unfair to home health aides who work 24 hour shifts and deserve to be paid for all of our hours worked. The rule also diminishes the quality of care the clients receive. I have worked as a home health aide for 23 years with Ridgewood Bushwick and United Jewish Council. For as long as I have been a home attendant, I have always worked 24 hour shifts. I currently work two shifts of 24 hours. For seven years I worked seven days a week of 24 hours shifts for two agencies. The proposed rule is unfair because it allows employers to avoid paying home health care aides for work that we do not, that we do during sleeping or meal break hours even when there is no clear distinction between at rest and being on-call. On these 24 hours shifts, I help my patients with walking, bathing, dressing, personal grooming, meal preparation, feeding, and toileting. I perform light and heavy cleaning such as vacuuming, mopping, dusting, and cleaning bathrooms, laundry, taking out garbage, shopping, and running errands for the patient. I escort patients to their appointments and on other outings. I have never gotten regular sleep. At most I've rested maybe three or four hours each night. Even when I'm resting, I am still aware of what's happening with my patient. I always have to make sure that my patient isn't getting up out of bed because she could leave the apartment and walk into the street, turn on the stove, or do

other things that would be dangerous. Caring for her is a huge responsibility and I have never forgotten something I was told by my supervisor at Ridgewood Bushwick when I first started. If something happens to my patient then I could go to prison. At night when I hear her bed creak, I jump out of bed immediately to tell my patient to go back to sleep. This happens every night. I am so worried about something happening to my patient that even when I use the bathroom I keep the door wide open so that I can monitor her. When I eat my meals, I am always on alert to make sure that my patient is safe. At the end of my shift, I am extremely exhausted. Further, the proposed rule also harms clients. I strongly oppose the proposed rule because of the unfairness to home health care aides who deserve fair payment for 24 hour shifts and because of the negative impact it has on the home health care patients. Sincerely, Ignacia Reyes.

Mario Musolino: Thank you. Xiao Huan Yu, followed by Qun Xiang Ling.

Xiao Huan Yu: (Interpreter) Hi everyone. I'm a home care aide from CPC. I've been working on 24 hour shifts for 12 years. Since 2007, I have been working on 24 hour shift to take care of a very ill old man and I can only get 12 hours pay per day and I only get \$19.00 plus dollars for the meal and then later on that was cancelled so we were only paid 14 hours a pay for 24 hour shift. I've been caring for this old man for 10 years. I have to feed him every day and I have to move him to his wheelchair and make sure he cannot take a shower and bath himself, so I have to use all my energy to lift the patient so I have a pain in my arms and I cannot sleep constant at night and my company stipulates that we have to turn the bed for the patient and also wash their bums and also clean them, so over the long run, in order to feed myself, I've been extremely tired having not enough sleep and I have back pain like other workers, and also ridiculously we cannot get paid at night so we are treated like a slave. Our work is very important; however, our treatment is not like a proper home care attendant. By the end of 2005, the company and their labor union require us to report the company when we work at night and also fill out a worksheet at night so I do it every night regarding what I do every night when I wake up and also send it to CPC. In 2008, the patient's family told me that their company asked them to install the surveillance camera to monitor our work; therefore, I have become a target of CPC. In 2008, in February, I was fired. I lost my job. I was very angry and I was very worried. I asked company why do you fire me? They just blamed it on the patient saying that the chief nurse of CPC saying that after 9:00 PM, the home care workers should not pay attention to the patient; only if they fall we need to call our 911. I was very shocked about what the company said; it is quite inhumane. So I file a complaint to the labor union. A Mr. Champ from the labor union said, if you work at night, if you don't work at night we just fire you. Thank you, you will lose your job.

Mario Musolino: Qun Xiang Ling. Thank you. Thank you. Next speaker please, Thank you. Next speaker please.

Qun Xiang Ling: Twenty-four hour shift is inhumane. It should be abolished, thank you.

Mario Musolino: Thank You. Good Morning.

Female: (Interpreter) Hi, Good Morning. I'm from CPC. I work for a 24 hour shift at CPC and I joined the company in August 2006. I've been working for 10 years doing 24 hour shift. In 2015, since I could not continue that 24 hour shift, I retired. When I joined CPC, I worked 10 to 18 hours a day. The CPC worker said you should wait. We don't have a new job for you. So I don't have any support. I don't have any income so I had to go back to the company to get new jobs so they gave me a 24 hr shift. I had one patient who was suffering from stroke and so I have to bathe him or feed him. When he needs to bathe I need his family members to help me to bring him to the bathroom so I help him to bathe and at night I have to change the diaper and they pee and shit and I have to clean the sheet, I clean it right away, and they change it and then turn them every two hours. So I have to stay next to the patient, I have to sleep next to them and they are always very noisy. Sometimes they need to eat, all in all so I have to keep working at night. They have ordered different amounts. So at night I need to get up at least four times each night. I work two jobs so I work three or four days a week on shifts so I take care of the patient. One on them is for five years and that patient has Alzheimer's. He's always in haywire and he kept saying that somebody is stealing his clothes and he needs to eat and he has to eat and so he makes a lot of amounts at night and at night he will change his clothes and try to get out so I have to change his diaper. I have to feed him milk and biscuits so I have to get up four to five times at night, each night. During daytime I have to feed him in the afternoon.

Mario Musolino: Thank you. Next speaker is Mei Kum Chu, followed by Hui Ling Chen.

Mei Kum Chu: (Interpreter) Good Morning everyone. My name is Chu Mei Kum. I been working at CPC since January 2003. I've been working on the 24 hour shift which is very demanding and the condition is very harsh. If I don't do the 24 hour shift otherwise CPC would not give me any jobs. Since 2003 to 2013, I've taken care, I've taken care of two patients. The first one is Mr. Lu, he was very heavy weighing more than 170 pounds. He has a lot of diseases, heart diseases, diabetes, and also he's inconsistent, and also he'd had a minor stroke and he has bad falls and he has broken bones in his right leg so he is in serious condition. My boss who gave me the job saying that each night I have to turn the patient in the bed every 90 minutes. In 2015, in May, one day I tried to support him to bathe him but he is so heavy and there is no strength in his leg. In order to prevent him from falling, I suffered serious back pain because I sprained my back so I cannot work and I've been treated for half a year which gets better, and for the second patient, which also requires 24 hour care, in 2016, I've been starting to taking care of him, he has a lot of problems. He has also osteoporosis, he has high blood pressure and also inconsistency, and also he has problem in his eyes, he cannot see, and also when he goes to bathroom, I need to support him to go bathroom. I need to support him to go bathroom four to five times a night so I cannot sleep properly and every one to two hours I will be woken up by him to bring him to the bathroom. In 2014, in July, it was very hot so I cut the hair for the patient and also bathe him and also wash the bed sheet and also cook for him and take care of him. He has no teeth so I have to feed him slowly and also clear all the fish bones for him and also cook the vegetables, etc., and on that day I cannot dress properly; therefore, I was so tired. Thank you

Mario Musolino: Thank you. Hui Ling Chen, followed by Rui Ling Wang.

Hui Ling Chen: (Interpreter) I'm a home care aide from CPC. My name is Hui Ling Chen. I've been working since 1998, and I've been doing 24 hour shifts since 2005. I have to cook a few meals for a day and I have to do it all myself and also clean his room and clean the kitchen, the bathroom, etc. At night at 1:00 AM, I still need to cook for him, cut noodles for him and he has to go to the bathroom four to five times at night, each night, and also have to take care of him so I cannot sleep at all, in that regard. I have to bring him to see the doctor so I have to get up at 5:00 to start making ___ for him and in 2009, my patient died and in 2006, I had another patient who requires 24 hour care so I had to take care of him, her for two nights. She is 99 years old and the job was very tough. Let's say when she has constipation, I had to help him, help her to poop so I had to take care of her. We had to be very patient and to cook and also change her clothes and also turn the bed at night. Right now I still work 24 hour shift for three days and for a long while I've done it for four days. It's very tough for me. I have insomnia. I cannot sleep. I have back pain, body pain, so we sacrifice our family in order to do this 24 hour job and our company is not giving us adequate pay and a home care worker have been told that we should not get up at night for the patient. We should not take care of them. However, the patient requires 24 hour care, we have to be responsible for that. For the 24 hour shift, it is very hard for the home care worker. I think we should do it at two shifts for 12 hours, otherwise it is harming our health and our welfare. This is our voice.

Mario Musolino: Thank you. Rui Ling Wang, followed by Jian Hua Deng.

Rui Ling Wang: (Interpreter) Hi, I'm from CPC. I'm the home care aide. I've been doing 24 hour shift for more than 20 years and in 2005 to 2014, I took care of the same patient until he died at the age of 93. Since he injured his leg with the hot water poured on his leg, so he has a lot of problems that shows and you can see the flesh in his bottom so the nurse will come to the home every day. We have to make sure change their clothes and also take the patient to outside to some sun so after three months of intensive care, his condition has improved so we have to feed him with soup, milk, drinks, and at night we have to change his diaper and also change the bed, and we have to be woken up anytime, so we have to wake up three to four times a day, so we cannot sleep consistently, continuously for four to five hours because of that long term care. So I have stomachache, I have low blood pressure, I have mental health issues, so I would say I'm a patient as well and also in that building there are a lot of people are gathering, gambling so a lot of police came into the building and so another way of pressure and harassment, mental harassment for us. So after the patient died, I cannot do the 24 shift anymore because my body cannot stand it. So later on another patient wants me to do it for 10 hour shifts so I have to push him in the wheel chair to other places so I have a back pain problems. I have to switch for another job. In 2014, I cannot work anymore so I had to stop at all and in the same August, year in August, I retired. The 24 hour shift really ruined my life and my health. I strongly require that I want to get the full pay for 24 hour work and also to abolish the 24 hour shift, we should institute two shifts of 12 hours instead.

Mario Musolino: Next, Jin Hua Deng, followed by Juan Bing Law.

Jim Hua Deng: (Interpreter) I've been a home aide worker for eight years. I've been doing 24 hour shifts since 2003. I've been doing that for three days in a week because other workers don't want to do it; therefore, at one point I need do five days in a week. The patient has colon cancer so we have to be very careful with the post-operation care, so we have to also have to take care of her husband as well, so we have to prepare the breakfast in the morning and then prepare for the meal for lunch and then in the afternoon, I have to clean the house and push the patient outside in the wheelchair to get some fresh air and also to shop in the supermarket and also bathe them. So it is very busy. So at night two patients wake up at different times so I have to get up four to five times a night so I can not sleep continuously for two hours; therefore I told boss, I want to get paid for 24 hours pay after judge has made a ruling, 24 hour pay should only get 24 hour pay, but the boss is not implementing that and those are the state government is not helping us and you are launching this new proposed rule challenging the national rule and violating our rights so we cannot lose, we cannot leave the patient, we cannot get the same pay as other worker and for the health of our home aide workers and our safety of the worker, I think we should have two shifts of 12 hours. Thank you.

Mario Musolino: Juan Bing Law. Juan Bing Law, followed by Suo Zhen Tang.

Juan Bing Law: (Interpreter) Hi everyone, my name is Law Juan Bing. I've been more than 20 years as a home aide worker at CPC. I've been doing 24 hour work. I have taken care of the a lot of ill patient and I have suffered from insomnia. I cannot sleep. In 2008, I took care of a granny who was 95 years old, she has Alzheimer's so she would get up at night and open the door and get out so I had to be very careful when I hear the door moving, I need to chase her outside from the lobby, chase her back to the home. Sometimes she would say that she did not eat at night and ask me to cook for her like in the wee hours. She could not distinguish the days and nights so I can not sleep with her at night. I have to get up at least three times at night. In the morning I took her off her daily ____, wash her clothes, clean her room, wash the bathroom, and in addition, I cannot let her go out on her own. Also another patient is 2016, I had to took care of another granny who was amputated so she could not leave the room. She had to lie in bed. She pee in bed, etc., so I have to move her and she was very heavy, and I need to move her in bed. She had to take 8 to 10 drugs at her day and she could not get sleep at night so I had to get up two or three times at night to change her diapers, get her something to drink, so I've been working for 24 hour shifts for a long time, which I'm scared of. It is inhumane work. I sacrifice my family, left my family and my kids to take care of other patients they have not been treated fairly and they have not been taken care of by the government. When I reported my 24 hour work, my company did not pay me for the 24 hour work; therefore, I decided to retire early. I don't want to ruin my life and my health. I support the idea that to institute two shifts, 12 hour shifts, for the 24 hour shifts instead, so I support the full time pay for 24 hours. Thank you.

Mario Musolino: Suo Zhen Tang. Suo Zhen Tang, followed by Xue Ying Wen.

Suo Zhen Tang: (Interpreter) Good Morning everyone. I'm the home care worker. (unclear) I've been working 24 hours two days and the client's right hand and right face is disabled.

Mario Musolino: I think it's her mic, let's restart again. Please, thank you.

Suo Zhen Tang: Hi Everybody, my name is Zhen Suo Tang. I'm a home health aide from 2005 to 2002. I've been working in the ___ and afterwards I have to go to the other place on Long Island. I've been working as a home health aide for 17 years and my client right hand and the right leg is disabled due to the cause of a surgery. Everyday I see wounds and pus near the wounds. Everyday I have to clean the wound for them. In the morning I have to take care of them to go to the restroom. In the morning he does not want to take off the diaper using my hand, they have to ask me to help them to go to the pharmacy also to purchase food and get food and then errands without leaving the client for two hours. Everyday we need to take care of them nicely, diligently and with the meal plan. In the evening, we need to get up around four to five times but after putting them to sleeping into the bed, sometimes they want to get up again and we need to help them go where they need to go to within the home. Because taking care of the patient in the evening, we are not able to constantly sleep five hours straight. Sometimes the patients family are not very understanding, they all tell us that if in the evening the patient needs to get up four or five times in the evenings, so the home health aide company has assigned another home health aide to assist me and then we need to make reports and make assessment and report and evaluate the patient and report to the company without getting paid for doing this other work duties. In the evening, if we need to get up five times, we need to punch in the card for 10 times. In the evening we wake up, we have to help the patient two times we punch the card. It's my own health that is affected, I have generated high blood pressure, insomnia, fatigue. I have told my health care provider the condition from the family doctor that I have high pressure...

Mario Musolino: Thank you. Xue Ying Wen. Xue Ying Wen, followed by Sau King Chung.

Xue Ying Wen: (Interpreter) Hi everyone, I joined a company in 2012, and I've been doing 24 hour shifts since 2015. I work two days a week and my patient had a kidney problem so he has to get dialysis twice a week so he is little has frequent meals and also he pees and poops in the bed, so I have to wash him and also cook for him and then clean the house and do the laundry, so it's been very busy for me, and at night I have to get up at least twice per night and bring him to the bathroom and then wash him. So I took care of him for the first month and the second patient started in 2015, and then the second patient has Alzheimer's. He cannot take care of himself so I need to support him when he gets up or sits down so he has no sense of space or patience, so I have to bring him to the bathroom with steps so I have to bathe him, also brush his teeth, clean his face, and he has to get up every night for twice or three times at night. The patient would cry, we have to make them happy and also at night we have to turn the bed to prevent, they have skin problems or bed sores, so I took care of this patient until 2018 and in 2016, in January, I worked for ABI Company doing 24 hour shift 2 days per week and the patient

was more than 90 hours, he had Alzheimer's. He cannot get up from the bed so every day we had to measure his blood pressure everyday and also make the record and also took his temperature, etc., and also change the diaper, and turn the bed, and also cook the meal, clean the house. We had to do everything. In June 2018, he was admitted to a hospital and then I got another job but now I work seven days a week, 5 hours per day, so my sleep has been much better and my spirit, my mental health is much better. I would say that 24 hour shift is a great harm to health of the home care workers. I think only 24 hour work should be paid for 24 hours and I want to have the new system to do two shifts for 12 hours. Thank you.

Mario Musolino: Sau King Chung, followed by Sau Lin Wong.

Sau King Chung: (Interpreter) Hi, Good Morning. My name is Sau King Chung. I work at CPC from August 2003, and in 2011, they send me to work on 24 hour shift and I worked three days a week and I stopped later on. The 24 hour shift was to take care of a 90 year old granny. She was very skinny. She had no energy so she could not get up from the bed or go the bathroom. I had to support her all the time. I have to prevent her from falling so I had to support her all the time. In the morning, at 7:00 AM, I have to clean her, change her clothes, and then cook her breakfast and clean the house, and then I had to go downstairs to get the grocery. Every night I could not sleep well. She kept banging the wall to wake me up so I had to get up. So she would say, I wetted by pants, I need to get up and bring me to the bathroom. So I felt the 24 hour shift made me very sick. There is a lot of pain, constant pain in my arms and my shoulders so I took sometime off from work. I rested for a few weeks and I told the company that and then the company said that if you not willing to do this then you should not do this work. Later on that patient asked me come back for once per week but the company would not let me do it. The company said if you go work for one day ___ there's not point for doing that so I stopped doing that for a few years so I stayed home to take care of my kids. So I think for 24 hour job we should get 24 hour pay. I hope that we can get the back wages that was owed. Thank you.

Mario Musolino: Sau Lin Wong.

Sau Lin Wong: (Interpreter) I worked at CPC as a home care aide. I started working in 2004. In 2006, I started doing 24 hour shift for CPC and took care of more than 20 patients on and off during that time, which was I took care of four to five patients for relatively longtime. The first patient was a 90 year old granny. She was totally incapable of moving so could not leave the bed so I had to change her and turn her twice at night so we had to feed her food through an IV, so we had the ___ to ensure it was not blocked and to make sure it was moving and the second patient was a man living at Henry Street, he was 90 year old. He had Alzheimer's so he would walk around at night so he wanted to open the doors so I had to watch him since, so he would open the gas on the stove at night; therefore, we had to take care of him. I've been doing that for more than two years and the third patient also has Alzheimer's who was 86 year old. He lived in Government subsidized housing so at night, he would get up and look for things so I could not sleep at all, so I've been taking care of him for more than two years. The fourth patient was a 80 year old granny. She had a stroke and she had dialysis so she cannot move. She had to sit in a

wheelchair. Her family members asked us to bathe her everyday because she is terminally ill we should not wash her everyday and we cannot do it on our own. We need the family members to help us to bathe her so at night we can also push her with the wheelchair to go to bathroom, so there a lot of pressure mentally. We have high blood pressure, we cannot sleep at night and 24 hour shift is inhumane and CPC has threatened us saying that is we don't do that kind of job, we will have no job to do at all. I have retired already; 24 hour shift is something that we have to oppose. We should have 12 hour shifts for two shifts instead. We should be paid for 24 hour pay. So the Government think that we just doing homework and these home aid can sleep at home but we cannot.

Mario Musolino: Tesla Dempster, followed by Sileni Martinez.

Tesla Dempster: (Interpreter) I have worked in homes for more than 10 years. I work five years 24 hour shifts seven days a week having only two days every biweekly, two days off biweekly. The regulations of the Department, the regulations of the Department of Labor are unfair because they allow the agencies; they allow the agencies to not pay what the carers do with hard labor. I took care of a patient with advanced case of Alzheimer working 24 hour shifts. She wasn't in bed. She wasn't a bed patient. She was a patient who the first time, the first time the patient has 24 hour, those not confined to bed that they request 24 hours. I want to emphasis a point that many times the patient, she was generally she was watching TV the entire day, trying to open the window, trying to open the doors to go outside. I removed her from the elevator twice. Once I have to come out of the bathroom coming with my bathrobe with shampoo in my hair, because she was running away in the elevator. I had to run after her. She was always trying to get the stove, she was on, she had forgotten what has happened with _____. I had another patient, she was confined to bed. I also worked 24 hours with her. She had, I had to turn her around every day and night, every two hours because otherwise her skin would break down or she could get bed sores like rash. I would have to feed her by mouth. I had to bathe her on the bed, I would have to change her pampers at least every three hours, I have to be checking her pampers every two to three hours. We are not agreeing with the regulations of the Department of Labor because it's unfair for us, the home attendants, we work hard 24 hour and we only get paid 13 hours. We have families to take care of. We get sick because many times we have medical appointments to which we cannot attend because we don't get the reliefs from the agencies, and although you request with them before, they don't send the replacement so we're requesting that please to eliminate the 24 hours and two twelve hour shifts that would benefit the employees of the home and also the patients, as well, because...Thank you.

Mario Musolino: Sileni Martinez. Sileni Martinez, followed by Catalina Bernardez.

Sileni Martinez: (Spanish – No Interpreter)

Mario Musolino: Thank you. Catalina Bernardez. Catalina? No. Elida Mejia. Elida?

Female: She is here.

Elida Mejia: (Interpreter) Good Afternoon. My name Elida Mejia. I'm here to present my testimony about the proposal by the Department of Labor of New York. I'm in a position to this relation to propose and I demand that the DOL retrieves the proposal because it is unfair for the home health attendants who work 24 hour shifts with the receive for all the working hours, the norm also reduces the quality of care that the patient requires, receives. I've worked as home health care like 15 years for the agency ___ and United Jewish Council. for all these years have worked 24 hour shifts from three to six days a week. The proposed regulation doesn't seem fair because it allows the agencies to abstain from paying assistants for the care that they do throughout the hours, during the hours, ___ asleep or they take a break to eat even though there is not a clear distinction in between resting time and being on call. When I worked, when I work, when I do caring work, I do a bit of everything. I would cook, I would cook food, I would bathe, I would clean, I would try to do errands, I would take them to the park. Many patients were confined to bed, they had Alzheimer's. During the night I wasn't able to sleep. I had to take care of somebody who needs of a service at night. The patient calls you, I need this, I need that, I have to help them to go to the bathroom, change their pampers, change their sheets, if they would be dirty. With all this 24 hour shifts, I have become diabetic, now I have knee pain...

Mario Musolino: Luz Estrella. Luz Estrella? No, and we have Catalina Bernardez who is here.

Catalina Bernardez: (Interpreter) Good Afternoon. My name is Catalina Bernardez. I'm presenting this commentary about the risks. I'm showing this commentary about the risks from the Department of Labor of New York about the workers, the 24 hour shifts, work 24 hours shifts work. _____ Proposed on April 25, 2018, I opposed to this rule, proposed ___ to withdraw the rules proposed, it's unfair for the carers, for home carers who work 24 hour shifts and they deserve to be paid for our work for the work hours. The rules also reduce the quality of care received by the clients, the customers. I work as a care giver for 12 years for 14 years and I've worked 24 hours during eight years. Normally I work three to four shifts of 20 hour shifts a week. The rules, the proposed rules are unfair because it allows them, the employers, to avoid the payment to the caregivers.

Mario Musolino: Thank you. Okay, next we will try Luz Estrella again. No. Mika Nagasaki, followed by Ignacia Reyes.

Mika Nagasaki: My name is Mika Nagasaki and I'm here today representing the Justice for Home Care Workers Campaign of the ___ Coalition. I'm a member of the Chinese Staff and Association which is one of the sponsors of the coalition. The New York State Department of Labor regulations which are the subject of today's hearing undermine the wage laws established after the three New York State Court decisions ruled that home attendants must be paid for all 24 hours of a 24 hour shift. The New York State DOL emergency rule allows employers to evade these court rulings. It forces home attendants to prove each day that they did not sleep at least five hours thus sanctioning the industry-wide practice of paying home attendants for only 13 hours in a 24 hour shift and we've already heard all day that that this is impossible to sleep more

than five hours. On behalf of the coalition, therefore, I am here in opposition to this rule. 93% of home attendants in New York are women and most are women of color and/or immigrants. For years, home attendants have been fighting to improve conditions for patients as well as for themselves. With this emergency regulation, the DOL has placed yet another obstacle in the path of home attendants and patients seeking a more just and humane system. The emergency regulation actually hurts patients. After the regulations were issued to avoid paying for the nighttime hours, agencies began instructing home attendants to ignore patient's needs, which is ridiculous. How can home attendants ignore their patient's needs? When workers refuse to ignore their patients, they are fired. The DOL is actually setting up conditions to make workers willfully ignore needy patients who are having crises as if to say that these medical conditions could be turned off; therefore, we demand the immediate cancellation of this emergency regulation, we demand that you stop resisting the court's ruling, we also want the insurance companies that manage long-term care plans and the agencies to immediately comply with the court decisions and compensate home attendants for all stolen wages. We also demand the abolishment of the 24 hour work day. It's insane that in 2018, we have a 24 hour work day. Patients who require 24 hours of care should be provided split shifts of 12 hours each to allow both the home attendants' time to recover and rest as well as to allow the patients to receive the care that they need. As we have heard today, the home attendants who are assigned a 24 hour shifts, they are assigned because they are approved, the patients are approved for round-the-clock care because of their medical condition. It's inhumane and unjust to continue with this regulation to force workers to work 24 hours and only pay them for 13 of those hours. Thank you.

Mario Musolino: Thank you. Ignacia Reyes. Ignacia Reyes? No. Amy Torres.

Amy Torres: Good Afternoon, my name is Amy Torres, Director of Policy and Advocacy. I'm delivering this testimony on behalf of the Chinese American Planning Council Home Attendant Program; CPCHAP. The Chinese American Planning Council Home Attendant Program, CPCHAP, is one of the largest not-for-profit home care agencies in New York City, licensed in 1999 and now serving about 3,000 home care recipients daily and employing over 4,000 employees. The following testimony and included recommendations outline the urgency for coordinated clarification of regulations to stretch across the New York State Department of Labor, Department of Health, managed care organizations, and Human Resources Administration contracts and labor groups. This coordinated response requires a state government solution to amend formula funding gaps created by any subsequent mandates. Currently DOL regulations established that home care aides who work 24 hour shifts for around the clock care or at minimum paid for 13 hours of work. Home care agencies base their payment models on this regulations because they are limited by HRA and MCO contracts which follow DOH funding formulas informed by the DOLs minimum regulations. Despite lawsuits claiming 24 hours pay for around the clock care, DOL has clarified the law in favor of the 13 hour rule. It's important to note that DOH has not legally bound to adjust the formula based on DOL regulations, so had DOL not clarified the law at that time agencies would have been mandated to pay through existing rates which are insufficient to cover the full 24 hours. A number of

advocates and workers have already spoken to the complexities and the emotional and intensive labor involved with home care work, so I'd like to take this time to skip pass that portion of my written testimony to address recommendations for compensation, work schedules, and care environment. Again, home care agencies need coordinated clarification of the regulations. Adding to the complexity our agencies who are caught between multiple overlap regulations and agreements that can complicate decisions about which and when aide staff are assigned to cases, for agencies wishing to explore less complicated options, like opting for multiple rotational shifts, the cost of current rates prohibit us from doing it. So our recommendations are to limit the 24 hour shift day for a single aide worker and establish a rotational shift system, to apply meal and sleep time to DOL standards for non-work, non-care work day activities, so currently travel that is incurred during the workday is allowed to be paid, meal and sleep time should also be allowed to be paid, following other DOL non-care activity regulations, and then third, in some rare instances in which case family friend or a family member is employed through CD path, 24 hour case, 24 hours care may be allowable but there would need to be a regular...

Mario Musolino: Thank you, we have your written testimony. We appreciate that. Let me go back to the folks who were not here, Marie Andreacchio, Walter Kaltenbach, Louis Majer, Liz Vladeck, Luz Estrella, Ignacia Reyes. Okay, that covers everyone. Thank you so much for your time and your testimony today. I will remind folks that we are accepting written testimony through the 18th? July 18th is the deadline for public comment, written testimony. So we would appreciate you submitted that if you haven't already provided it today. Thank you very much.

Exhibit 15

Andryeyeva v. New York Health Care Inc.
Transcript of Oral Arguments

February 12, 2019

(excerpted)

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COURT OF APPEALS

STATE OF NEW YORK

LILYA ANDRYEYeva AND MARINA ODRUS, ET AL.,

Respondents,

-against-

NO. 11

NEW YORK HEALTH CARE, INC., ET AL.,

Appellants.

ADRIANA MORENO And LEONIDAS PEGUERO-TINEO, ET AL.,

Respondents,

-against-

NO. 12

FUTURE CARE HEALTH SERVICES, INC., ET AL.,

Appellants.

20 Eagle Street
Albany, New York
February 12, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



1 they could proceed to pass a regulation, as they have tried
2 with their emergency regulation - - - to actually define
3 availability of work in the way that they have always
4 interpreted it?

5 MR. SWEENEY: The Department of Labor can
6 certainly promulgate a new regulation. To do so, it must
7 go through the legal requirements to change the regulation,
8 to change the minimum wage order.

9 JUDGE RIVERA: But your position isn't that they
10 could never actually take this position?

11 MR. SWEENEY: The - - - there's - - -

12 JUDGE RIVERA: Just that they have to go through
13 the proper regulatory process to do so, that - - -

14 MR. SWEENEY: There - - - there's a clear process
15 by which the Department of Labor promulgates regulations.
16 And - - - and they must follow that. That's the law. They
17 - - -

18 CHIEF JUDGE DIFIORE: And now, counsel, we'll
19 hear from the Government. Thank you.

20 MR. SWEENEY: Thank you.

21 MR. WU: May it please the court, Steven Wu for
22 the Department of Labor.

23 CHIEF JUDGE DIFIORE: Take us through, counsel,
24 your interpretation of the Wage Order, getting straightaway
25 to "available for work".

1 MR. WU: Absolutely. And let me begin with the
2 purpose of this rule. I mean, the purpose of DOL's
3 longstanding policy is to identify the quite narrow set of
4 circumstances under which the ordinary rule that idle time
5 is compensable time - - -

6 JUDGE FAHEY: Well - - - well, let's take a step
7 back - - -

8 MR. WU: - - - should be excepted.

9 JUDGE FAHEY: - - - excuse me counselor. Before
10 you do that, let's take a step back for a second and
11 clarify what you're talking about. You are not talking
12 about - - - when we talk about this eight-hours sleep or
13 eight-hours work during the night and five hours
14 uninterrupted sleep, what we're talking about is an opinion
15 letter. We're not talking about a rule, a regulation, or
16 any statutory requirement, are we?

17 MR. WU: Well, it's a series of interpretations
18 and enforcement guidelines - - -

19 JUDGE FAHEY: I understand that.

20 MR. WU: - - - and so on.

21 JUDGE FAHEY: But in essence it culminates in a
22 2010 opinion letter. It's an opinion letter, right?

23 MR. WU: The 2010 opinion letter is - - - is part
24 of that. But - - -but I want to be clear that it is
25 routine in the labor area in both federal and state levels

1 - - -

2 JUDGE FAHEY: No, no, no. Not my question. You
3 can - - - you can say all those things. But I want to be
4 clear as to what it is.

5 MR. WU: Correct. All right.

6 JUDGE FAHEY: It is - - -

7 MR. WU: These are a series of enforcement
8 guidelines and opinion letters that interpret - - -

9 JUDGE FAHEY: All right, so - - -

10 MR. WU: - - - the underlying statute and the
11 Wage Order.

12 JUDGE FAHEY: - - - and they're - - - we see
13 these all the time. We see them from the Attorney General
14 opinion letters. The court, of course, has to take notice
15 of them, but they are not entitled, in any statutory
16 construction standard, to the kind of deference that I
17 would give to a normal regulation. And you aren't arguing
18 that here today?

19 MR. WU: And - - - and we are not. And I think
20 the case that I think answers that question quite directly
21 is the Supreme Court's decision in Skidmore, which was
22 about a federal Department of Labor interpretation quite
23 like this one, arose from a series of informal enforcement
24 guidelines. And that's the origin of Skidmore deference in
25 the federal courts, which is to defer to the expertise and

1 experience of the agency, you know, given its
2 persuasiveness, consistency, and history.

3 JUDGE FAHEY: Of course we - - - of course.
4 You're the people who do it every day. Of course we should
5 listen to you. That however, is not the same as the kind
6 of mandatory deference that we would be required to give.
7 And you aren't - - - you aren't asking us to do that here?

8 MR. WU: We are not. And that is part of the
9 reason why we think the length and vintage of this history
10 is important for our deference - - -

11 JUDGE FAHEY: I see.

12 MR. WU: - - - argument.

13 JUDGE FAHEY: Go ahead, Mr. Wu.

14 MR. WU: And - - - and on the question of what
15 this criteria is - - - is intending to accomplish, it is to
16 identify those circumstances where meal breaks and sleep
17 breaks are regularly scheduled, substantial, and
18 meaningful, so much so, that it is reasonable for the
19 Department to conclude that the time spent on those breaks
20 is really for the employee's benefit, and not for the
21 employer's.

22 And in that sense, as a practical matter, the
23 employee is not available for work if the employer honors
24 the restrictions that the Department has imposed.

25 JUDGE WILSON: Can you try, then, to answer Judge

1 Garcia's question, which is: the statute looks as if it
2 has a specific exclusion that applies only if you are
3 residential, which at least arguably implies that if you
4 are not residential, if your stuff is somewhere else, you
5 don't get the benefit of the exclusion, and the rest of the
6 statute applies?

7 MR. WU: So - - - so there's a couples of answers
8 to that. And one is that in the speech that's on page 119
9 and 120 of our addendum, it was explained that that was in
10 the Wage Order, because at the time, residential employees
11 were common, and the type of arrangement we have now, where
12 you have a third-party employer of individuals sent to
13 clients' homes, didn't really exist. I think that's the
14 explanation for why that specific provision is in - - - is
15 in the Wage Order.

16 But - - - but the other broader point is this.
17 That the - - - the Wage Order has never been understood to
18 be sort of the four corners of the Department's policy when
19 it comes to compensable time. I mean, there was earlier
20 discussion of "subject to call" and "on-call" and that
21 distinction. And that - - - that distinction between sort
22 of the - - - the gray area where somebody is working or not
23 working is not contained in the Wage Order either, and yet
24 is a well-established feature of compensable time.

25 JUDGE GARCIA: I have a problem with that. I

1 mean, this is a Wage Order. It's promulgated through a
2 specific process that's spelled out, and it tells people,
3 you're working twenty-four hours, when are you going to get
4 paid. But now you're saying, no, no, no, it's not the four
5 corners. Because we can have a speech or we can have a
6 letter, and that will knock off what, forty-five percent of
7 whatever time you're there. One, I have a problem with
8 deferring to that type of an arrangement, but two, I still
9 don't understand how within a regulation, you can have a
10 term "available for work", where as an agency, you felt it
11 necessary to carve out sleeping time within the reg,
12 because otherwise it would be covered by "available to
13 work", but now in an opinion letter you're saying no, no,
14 no; "available for work" doesn't really mean that you're
15 sleeping. It's only you're sleeping.

16 But here, you assumed "available for work" when
17 you made - - - covered you, you got paid when you were
18 sleeping, because you had to carve it out.

19 MR. WU: Well, and I guess my answer is this. We
20 don't think the residential employee provision is a carve-
21 out. It is a clarification. The word "however" there is
22 really to express - - - to avoid any doubt about how you
23 might apply this provision.

24 And the Department has consistently said and has
25 interpreted the phrase "available to work" or "required to

1 be available for work" separate from residential - - -

2 JUDGE GARCIA: I think it's almost - - -

3 JUDGE FAHEY: How about - - -

4 JUDGE GARCIA: - - - a difficult argument to
5 make, because someone who's living on the premises, you can
6 almost see saying that's your normal sleeping quarters, so
7 when you're sleeping, you know, you're there anyway. You
8 live there.

9 But now you're - - - and you needed to "however"
10 that. Now you're saying no, no, no, you were sent there by
11 your employer, so all things being equal, you're not
12 sleeping in that chair, but because you get to sleep in the
13 chair, we're not going to pay you for that time.

14 MR. WU: Well - - -

15 JUDGE GARCIA: And that would seem to be a more
16 necessary carve-out from your definition than even what you
17 have.

18 MR. WU: Well, and I think that's part of the
19 reason why the Department has been consistently issuing
20 these guidance documents and guide - - - and opinion
21 letters almost contemporaneously - - -

22 JUDGE GARCIA: Why didn't you must amend the reg
23 - - -

24 MR. WU: - - - with the - - - with the Wage
25 Order.



1 JUDGE GARCIA: - - - why didn't you amend the
2 regulation?

3 MR. WU: As I said, the Department could - - - I
4 think has the power to do so. The longstanding practice in
5 this area has to be proceeded by - - - has been to proceed
6 in the form of these informal enforcement - - - enforcement
7 guidelines.

8 JUDGE STEIN: How wide is the applicability of
9 this? Does this apply to ambulance drivers? Does it apply
10 to firefighters? Does it - - - you know, are we limited
11 here to - - - to home healthcare aides?

12 MR. WU: Well, so the origins of this rule comes
13 from workers working twenty-four-hour shifts. And the
14 Department made a judgment about the nature of the meal and
15 sleep breaks that workers with twenty-four-hour shifts will
16 be undertaking.

17 It was then applied to home health aides when
18 they were brought under the scope of the - - - of the
19 Minimum Wage Act. And you know, to defend the
20 reasonableness of that interpretation, I think the judgment
21 here was that when somebody is working twenty-four hours,
22 they will have to sleep and eat some time during that
23 period. And the Department will allow exclusion from
24 minimum wage and overtime for those periods, but only when
25 the employer adheres strictly to the requirements the

1 Department has - - - has imposed.

2 And that's why, for instance, although the facts
3 of this case are not something that the Department has
4 investigated, you know, sleeping in a chair next to a
5 patient's bed is - - - it is unclear whether that would
6 comply with the requirement that there be adequate sleep
7 facilities, which has been a feature of this part of the
8 Department's interpretation, since its inception.

9 JUDGE RIVERA: So can I - - - just to be clear,
10 with respect to the residential employee, there - - - this
11 carve-out always applies. Is a residential employee never
12 able to get paid if they too are disrupted in their sleep
13 and meal patterns?

14 MR. WU: There's - - - I think there's separate
15 guidelines for residential employees - - -

16 JUDGE RIVERA: Yeah.

17 MR. WU: - - - that are interpreting this - - -
18 this provision. I do not think it is a flat rule that they
19 can never get paid for that - - - for that period of time.
20 And - - - and importantly, the policy for what - - - what
21 are in this case nonresidential employees and residential
22 employees, is consistent. The Department is trying to
23 apply the same principle across both of these categories of
24 workers, namely, just identify circumstances where I think
25 it is reasonable to think that the time is largely the



1 employer's (sic) own.

2 JUDGE RIVERA: Well, in part - - - well, I know
3 that you've argued in part there's a desire for the
4 commissioner to align these rules with the federal rules.
5 But I also want to ask, is this in part an attempt to
6 recognize that you deal with the kinds of abuses that are
7 alleged here through enforcement as opposed to a particular
8 way of reading your own regulation?

9 MR. WU: That - - - that - - - that's exactly
10 right. And - - - and one thing I do want to emphasize is
11 that the Department treats as seriously the exclusion parts
12 of this - - - the - - - the narrow circumstance of this
13 rule as it does the exclusion.

14 I mean, the - - - there are many situations where
15 employers fail to satisfy the prerequisites for excluding
16 this time. And one thing I do want to clarify, Judge
17 Rivera, is that if the employer does not satisfy these
18 prerequisites, it's not just the time working that the
19 employee is compensated, but actually the entire twenty-
20 four-hour period. You get interrupted for meal times, you
21 get that hour of compensation. You don't get the five
22 hours of sleep, you get paid for the full eight hours.

23 So it is a hair-trigger application of these
24 provisions to protect workers from the types of abuses that
25 the Department regularly sees.

Exhibit 16

Personal Touch HHA Live In Agreement

April, 2019



HHA LIVE IN AGREEMENT

As a live-in Home Health Aide (HHA) or Personal Care Aide (PCA) you will be residing in the home of a Personal Touch Home Care of N.Y., Inc. (Personal-Touch) client as an employee of Personal-Touch. All employment with Personal-Touch is contingent upon your compliance with this agreement and all other Personal Touch policies, procedures, and guidelines.

Live-In HHAs/PCAs are required to stay on the client's premises at all times during their assignments, except as specified below. Live-in HHAs/PCAs are paid a flat rate for their day, which, on an hourly basis, equals or exceeds the applicable minimum wage for all hours worked. During a 24-hour period to which they are assigned, HHAs/PCAs are to perform tasks in accordance with the Care Plan. As a Live-In HHA/PCA, your hours of work will consist of the following:

- The total time required to perform all tasks on the Care Plan should not exceed 13 hours in any day without prior approval from the HHA's/PCA's Coordinator or Field Nurse Supervisor;
- 8 hours sleep with at least five (5) uninterrupted hours of sleep;
- Three (3) hours away from work duties for meals and other personal pursuits (you may not leave the client's home unless specifically noted on the client's care plan).

In the event that an HHA/PCA is unable to get a reasonable night's sleep or the HHA/PCA finds that the amount of care required by the client exceeds the 13 hours provided for in this agreement or the amount specified on the client's care plan, the HHA/PCA must notify the Coordinator immediately. The Coordinator and Nurse will reassess the appropriate level of care that this case requires.

If during a single week a Live-in HHA/PCA works more than 40 hours, the HHA/PCA will be paid overtime at the applicable State or Federal rate for all hours worked in that week.

Further the following policies must be adhered to:

- Live-In HHAs/PCAs are required, unless specifically stated otherwise in the Client's Plan of Care, to stay on the client's premises at all times during assigned days unless performing duties such as running errands, grocery shopping, etc. for the client.
- If at any time, an HHA/PCA must leave the client's premises prior to the end of an assignment, the HHA/PCA must notify the Coordinator so that appropriate measures may be taken. To maintain the safety of our clients, an HHA/PCA must stay with the client until assistance or a relief HHA/PCA arrives.
- Phone calls are to be limited to calls to the EVV for attendance verification, to report problems, changes in plan of care, changes in client condition, and/or emergencies.
- Personal phone calls are not allowed while in the client's home. Any violation of this condition that results in charges incurred on a client's phone bill could result in disciplinary action up to and including termination.
- HHAs/PCAs are not to give their personal phone number to clients and/or client's family members. Personal calls on your cell phone are limited to your personal break time.
- HHAs/PCAs are not to give the client's name, address, or phone number to anyone.
- HHAs/PCAs must be respectful of the client's home at all times and provide privacy for the client when appropriate even though you reside there as well.
- Your family members and/or friends are never allowed in or around (including in a parked car) the client's home without prior authorization from the Coordinator.

It is important that the office know where you are at all times during your assigned days in the event of any emergency. If we are to maintain a good working environment, HHA/PCA and client safety must always come first. Failure to maintain these standards could result in disciplinary action up to and including termination of your employment.

I have read and agree to follow the Live-In Home Health Aide Agreement and policies therein, as well as any additional instructions I receive. I also understand that if I violate this agreement, I will be subject to disciplinary action up to and including immediate termination of employment without previous warning.

HHA/PCA Signature

Printed Name

Date

Agency Representative

Printed Name

Date

Revised 4/2019

- [Bill Pay](#)
- [Notice of Privacy Practices](#)
- [Complaints](#)

POLICIES



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Exhibit 17

Claim Letter to New York State Department of Labor Regarding Chinese- American Planning Council

August 13, 2019

August 13, 2019

Blaine (Fin) V. Fogg
President

BY EMAIL: Labor.sm.LSClaim.Intake@labor.ny.gov

Janet E. Sabel
*Attorney-in-Chief
Chief Executive Officer*

New York State Department of Labor
Division of Labor Standards
State Campus, Building 12
Albany, NY 12240

Adriene L. Holder
*Attorney-in-Charge
Civil Practice*

**Re: Claims of Unpaid Wages, Overtime and Spread of Hours Against
Chinese-American Planning Council Home Attendant Program, Inc.**

To Whom This May Concern:

The Legal Aid Society represents the following workers, all of whom are or were employed by Chinese-American Planning Council Home Attendant Program, Inc. ("CPC"):

- (1) Gui Zhu Chen,
- (2) Zhao E. Jiang,
- (3) Jie Yun Chen,
- (4) Yong Qin Huang,
- (5) Li Jiang, and
- (6) You Li.

All of the claimants worked multiple, consecutive, 24-hour shifts per week for which they were paid only 13 hours per shift despite having consistent nighttime duties that prevented them from obtaining five hours of continuous and uninterrupted sleep and three hours of meal breaks per shift. They now submit wage claims seeking unpaid wages, overtime, spread of hours pay, liquidated damages, and other damages related to CPC's failure to provide full and accurate paystubs in accordance with the Minimum Wage Order for Miscellaneous Industries and Occupations and the New York Labor Law.

Gui Zhu Chen

Ms. Chen began working for CPC in or about March 2013. From approximately September 2013 until February 2019, Ms. Chen worked multiple, consecutive, 24-hour shifts: three consecutive shifts until April 2014 and four consecutive shifts from April 2014 until mid-February 2019. For that entire time, Ms. Chen cared for a patient who was around 100 years-old with Alzheimer's/dementia and high blood pressure. Ms. Chen's patient also suffered from a urinary tract disorder that required Ms. Chen to assist her patient with toileting (changing her diaper, using her bedside commode, and being walked to the bathroom) every 30 minutes to 1 hour throughout the night.

Since February 2019, Ms. Chen works two, six-hour shifts, two, four-hour shifts and one 11-hour shift per week.

Zhao E. Jiang

Ms. Zhao began working for CPC in or about April 2013. From April 2013 through February 2015, Ms. Zhao worked four consecutive, 24-hour shifts caring for a patient in her eighties who suffered from Alzheimer's/dementia, diabetes, high blood pressure, Parkinson's disease, and required the assistance of breathing equipment. In 2014, Ms. Zhao's patient became bedbound, and required turning and repositioning every two hours, in accordance with her care plan. Ms. Zhao also changed her patient's every two hours, including throughout the night. (Prior to becoming bedbound, Ms. Zhao assisted her patient with toileting at least four times per night.)

In or around March 2015 until approximately February 8, 2019, Ms. Zhao cared for the same patient as Ms. Gui Zhu Chen. Like Ms. Chen, Ms. Zhao was required to help her patient with toileting every 30 minutes to an hour throughout the night.

For approximately one week, Ms. Zhao submitted forms seeking pay for the night work she performed. After submitting the forms, Ms. Zhao received less than \$100 from CPC, ostensibly as compensation for her night work. However, CPC shortly afterwards recouped the money from Ms. Zhao. At the time, Ms. Zhao was told that the money was being taken from her because her patient's son believed that the forms had been completed fraudulently. Ms. Zhao suspects that her patient's son was under pressure from CPC to stop Ms. Zhao from submitting night work forms because CPC must have threatened to disenroll her patient and recommend her for nursing home care.

Jie Yun Chen

Ms. Chen started working for CPC in 2003. From January 2009 until June 2016, Ms. Chen cared for a woman who suffered from Alzheimer's/dementia, diabetes, and was bedbound.¹ In 2013, Ms. Chen's patient developed a condition that caused her entire body to become covered in bleeding ulcerative eruptions that were so painful that the patient would wake up crying throughout the night. In accordance with her patient's care plan, Ms. Chen turned and repositioned her patient every two hours. Ms. Chen also changed her patient's diaper every 1.5 hours, including throughout the night.

Yong Qin Huang

Ms. Huang began working for CPC in 2005. From 2009 until June 2012, Ms. Huang worked three consecutive, 24-hour shifts. From September 2012 until February 2013, Ms. Huang worked three, 11-hour shifts per week. From June 2012 until February 2017, Ms. Huang worked three, 12-hour shifts per week. Since approximately March 2017, Ms. Huang has worked two consecutive, 24-hour shifts per week caring for a patient in her nineties who is bedbound. Ms. Huang turns and repositions her patient's body every two hours, in accordance with her patient's care plan. Ms. Huang also assists her patient with toileting (changing her diapers, assisting her with using her bedside commode, and going to the bathroom) every two hours, including throughout the night.

¹ Ms. Chen retired in December 2017. From June 2016 until the time she retired, Ms. Chen worked two, nine-hour shifts per week. She was paid \$16.10/hour, which was comprised of her \$15/hr base hourly wage plus \$1.10 in weekend differential pay as per CPC's contract with 1199 United Healthcare Workers East.

Li Jiang

Ms. Jiang began working at CPC in 1991. From January 2009 until approximately March 2013, Ms. Jiang worked alternating weeks of three or four consecutive, 24-hour shifts per week. Ms. Jiang's last twenty-hour assignment was to care for a woman in her nineties who required assistance with using her bedside commode three or four time per night. From March 2014 until June 2016, when she retired, Ms. Jiang worked five, 4-hour and two, 8-hour shifts per week. She occasionally worked 24-hour shifts, replacing workers who were unable to attend their regular shifts. However, the work was irregular and infrequent.

You Li

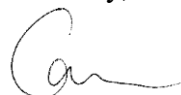
Ms. Li began working for CPC in or about April 2004. Since approximately April 2013, Ms. Li has cared for a patient in her eighties who is bedbound and suffers from Parkinson's disease.² From April 2013 through November 2016, Ms. Li worked four consecutive, 24-hour shifts per week. Since December 2016, Ms. Li works three consecutive, 24-hour shifts per week.

At least two times per night, Ms. Li assists her patient with toileting – either by changing her patient's diaper or assisting her with using her bedside commode. Ms. Li's patient's care plan requires turning and repositioning every two hours. Several years ago, when CPC provided forms to its workers allowing them to submit claims for "night work," Ms. Li asked her patient to sign forms confirming the work Ms. Li performed. However, Ms. Li stopped submitting forms for her night work when the head nurse of CPC, Nurse Li, called Ms. Li, Ms. Li's patient, and the son of Ms. Li's patient multiple times telling each that the patient was "harassing" Ms. Li at night and that if she did not stop the "harassment," the patient would be sent to a nursing home.

None of the claimants were able to sleep for five hours, continuously and without interruption, when assigned to work 24-hour shifts. None of the claimants received three hours of duty-free meal breaks per shift. Therefore, all twenty-four hours of claimants' shifts are compensable work time. Moreover, none of the claimants received spread of hours pay. On the rare occasions when they received overtime pay, only thirteen of the claimants' 24-hour shifts were counted towards overtime accrual. Finally, Ms. Zhou E. Jiang and Ms. You Li both suffered retaliation when they requested pay for work performed at night.

If you have any questions or require additional information, please do not hesitate to reach out to me using the contact information listed in the letterhead above.

Sincerely,



Carmela Huang
Supervising Attorney

² Ms. Li alternates care duties with complainant Hui Ling Chen whose claim was filed on July 30, 2019.

Exhibit 18

New York State Department of Health Summary of Assessment of Public Comment

(excerpted)

Comment: A few commenters recommended that the regulations be amended to require the IA and IPP reviews be inclusive of a night-time needs evaluation, inclusive of sleeping accommodations for any personal assistance or home health aides. Commenters stated that this part of the assessment is critical for properly identifying what services should be authorized for an individual and for allowing individuals to safely remain in the community, as MMCOs and LDSS could inaccurately assume that an individual does not require authorization for any night-time need services if this component is not included in the completed CHA.

Response: The regulations maintain the requirement to assess and document the frequency of needs throughout a calendar day for cases that involve live-in or 24-hour continuous care, and MMCOs and LDSS may assess and document such needs for other cases as well. As described in current guidance from the Department, this would include identifying night-time needs. These requirements work in concert with the current CHA tool, which has been used for years by MMCOs and LDSS, and will now be used by the IA as the evidence-based validated assessment tool for determining needs for assistance with ADLs and IADLs. The Department has maintained the responsibility to assess frequency of needs with the MMCOs and LDSS because the current CHA tool does not ask these questions, and the Department does not have another evidence-based validated assessment tool that can be used for this purpose, as is required under Section 365-a(2)(e)(v) of the Social Services Law. To the extent that changes to the CHA tool itself

are proposed, the Department has taken them under advisement, but has determined that such changes are not immediately needed to implement the IA.

Comment: One commenter suggests that the IA document whether a home health aide or personal assistant will be able to get sufficient sleep and meal breaks, and that the regulation should specify the consequences should this fail to occur.

Response: Please refer to the Department's previous response.

Comment: Commenters requested clarification on the IA's role in determining and documenting rationale for 24-hour personal care cases.

Response: Please refer to the Department's previous responses.

Comment: Commenters expressed concern that the regulations do not sufficiently require documentation by the MMCO or LDSS of the availability and acceptability of informal supports. Commenters further noted that it is similarly important that the MMCO or LDSS be required to document when there has been a change in the availability of informal supports for an individual before reducing services.

Response: The Department agrees with the commenter that fully utilizing available informal supports as a reason for a discontinuance or reduction is captured already under 18 NYCRR § 515.14(b)(4)(vii)(c)(2)(i) for discontinuances or reductions based on changes in social circumstances. Accordingly, the Department is revising the regulation

Exhibit 19

Email Correspondence with New York State Department of Labor

May 18, 2022

From: **McCann, Maura S (LABOR)** <Maura.McCann@labor.ny.gov>
Date: Wed, May 18, 2022 at 1:05 PM
Subject: RE: Cases inquiry
To: Y Z <zhangyueheng@gmail.com>, Labor.sm.LSClaim.Intake <LSClaim.Intake@labor.ny.gov>

Hello,

I'm sorry for any confusion I may have caused with my response. We are reviewing each claim and have yet to decide what course of action to take for each claim. Once we decide you will receive a letter with information. We hope to provide that information to you soon.

Maura McCann

Director Labor Standards

New York State Department of Labor | Division of Labor Standards

Harriman Office Campus
Building 12, Room 266B, Albany NY 12240
Office: 518-457-2460 | maura.mccann@labor.ny.gov
[Facebook](#) | [Twitter](#) | [YouTube](#) | [LinkedIn](#)

From: Y Z <zhangyueheng@gmail.com>
Sent: Wednesday, May 18, 2022 12:14 PM
To: Labor.sm.LSClaim.Intake <LSClaim.Intake@labor.ny.gov>
Cc: McCann, Maura S (LABOR) <Maura.McCann@labor.ny.gov>
Subject: Re: Cases inquiry

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Hi Ms. McCann,

Thanks for getting back to me so quickly. Since the cases of these 7 claimants were mailed to you as far back as in January, can you tell me why there is such a delay? The workers are worried about their statute of limitations if their cases are not processed— what should I tell them?

Also, you said that other recently filed home care agency complaints were also not processed. Can you tell me when the DOL stopped processing home care claims so I can let other workers

know, too? Thanks. I filed on behalf of many more workers since January and have not heard back either.

Best
Yueheng Zhang

On Mon, May 16, 2022 at 10:52 AM Labor.sm.LSClaim.Intake <LSClaim.Intake@labor.ny.gov> wrote:

Hello,

We have not yet processed these, or other recently filed home care agency complaints, but we did receive them. We hope to be able to respond to you soon.

Thank you.

Maura McCann

Director Labor Standards

New York State Department of Labor | Division of Labor Standards

Harriman Office Campus

Building 12, Room 266B, Albany NY 12240

Office: 518-457-2460 | maura.mccann@labor.ny.gov

[Facebook](#) | [Twitter](#) | [YouTube](#) | [LinkedIn](#)

From: Y Z <zhangyueheng@gmail.com>

Sent: Friday, May 13, 2022 4:28 PM

To: Labor.sm.LSClaim.Intake <LSClaim.Intake@labor.ny.gov>

Subject: Cases inquiry

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Hello,

I'm a representative at the Chinese Staff and Workers Association, and I'm writing to check in the status of the LaborStandards Complaints I filed on behalf of 7 claimants:

Cui Tian Kuang
Yu Hua Li
Su Ling Chen
Chuen Fan Ng
Xue Fen Peng
Yu Huan Zhong
Yue E Shi

They all filed against a home care agency called All Season. Some filed additional cases against Partners in Care, Premier, and Amazing.

Please let me know by replying to this email in your earliest convenience. Thank you.

Best,
Yueheng Zhang
CSWA

Exhibit 20

Email Correspondence with New York State Department of Labor

August 16, 2022

From: [McCann, Maura S \(LABOR\)](#)
To: [Lee, Young](#)
Cc: [Bhatt, Milan A \(LABOR\)](#); [Lazelle, Jeanette \(LABOR\)](#); [Nathanson, Rebecca \(LABOR\)](#); [King, Frank Y \(LABOR\)](#); [Gao, Nancy O \(LABOR\)](#); [Burkard, Michael \(LABOR\)](#)
Subject: Update for Legal Aid Society on 24 Hour Home Care Cases
Date: Tuesday, August 16, 2022 1:00:09 PM

You don't often get email from maura.mccann@labor.ny.gov. [Learn why this is important](#)

Good afternoon,

I am writing to ask Legal Aid Society's assistance in providing a status update to worker organizations, as we believe your organization helped in filing many original claims.

Labor Standards recently invited Flushing Workers Center and Chinese Staff and Workers' Association representatives to meet and discuss our plans for investigating hundreds of claims they recently filed involving inadequate sleep time for home care workers working 24-hour shifts. During the meeting, each organization requested an update on the investigation status of older cases. The cases listed below involve inadequate sleep time allegations and were docketed before 2020. Letters of representation show the Legal Aid Society is the designated representative of several complainants on these cases.

If your organization worked with the Flushing Workers Center and Chinese Staff and Workers' Association in filing these claims, we would greatly appreciate it if you could provide them with a status update. If Legal Aid Society staff has questions about the cases listed below, or any other cases, please contact Chief Investigator Frank King, who is copied above.

- First Chinese Presbyterian – Subpoena for records in 2019. Partial records received and reviewed. Waiting for outcome of SEIU arbitration decision before proceeding further.
- Chinese-American Planning Council – Subpoena for records in 2019. Partial records received and reviewed. Waiting for outcome of SEIU arbitration decision before proceeding further.
- United Jewish Council – Subpoena for records in 2019. Partial records received and reviewed. Waiting for outcome of SEIU arbitration decision before proceeding further.
- Family Home Care – Subpoena for records in 2019. Partial records received and reviewed. Waiting for outcome of SEIU arbitration decision before proceeding further.
- Preferred Home Care – Preparing referral for an Order to Comply for 1 of 2 claimants.

- S&A Unified Homecare – investigation active.
- Alternate Staffing – investigation active.

Please don't hesitate to reach out if you have any questions or concerns. Thank you.

Maura

Maura McCann

Director Labor Standards

New York State Department of Labor | Division of Labor Standards

Harriman Office Campus

Building 12, Room 266B, Albany NY 12240

Office: 518-457-2460 | maura.mccann@labor.ny.gov

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Exhibit 21

New York State Department of Labor Minimum Wage Order for Miscellaneous Industries and Occupants

June 24, 2020

(excerpted)

Minimum Wage Order for Miscellaneous Industries and Occupations

Part 142 of Title 12 of the Official Compilation of Codes, Rules, and Regulations of the state of New York
(Cited as 12 NYCRR 142)

Promulgated by the Commissioner of Labor Pursuant to the Minimum Wage Act
(Article 19 of the New York State Labor Law)

Statutory authority: State Administrative Procedure Act (SAPA) § 202(6) and Labor Law §§ 21(11) and 659.

WE ARE YOUR DOL



As amended
Effective June 24, 2020

- 142-2.18 Spread of hours
- 142-2.19 Meal
- 142-2.20 Lodging
- 142-2.21 Tips
- 142-2.22 Required uniform
- 142-2.23 Student

§ 142-2.1 Basic minimum hourly wage rate and allowances.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) *New York City* for

(i) *Large employers* of eleven or more employees

\$11.00 per hour on and after December 31, 2016;

\$13.00 per hour on and after December 31, 2017;

\$15.00 per hour on and after December 31, 2018;

(ii) *Small employers* of ten or fewer employees

\$10.50 per hour on and after December 31, 2016;

\$12.00 per hour on and after December 31, 2017;

\$13.50 per hour on and after December 31, 2018;

\$15.00 per hour on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

\$10.00 per hour on and after December 31, 2016;

\$11.00 per hour on and after December 31, 2017;

\$12.00 per hour on and after December 31, 2018;

\$13.00 per hour on and after December 31, 2019;

\$14.00 per hour on and after December 31, 2020;

\$15.00 per hour on and after December 31, 2021,

(3) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

\$9.70 per hour on and after December 31, 2016;

\$10.40 per hour on and after December 31, 2017;

\$11.10 per hour on and after December 31, 2018;

\$11.80 per hour on and after December 31, 2019;

\$12.50 per hour on and after December 31, 2020;

\$13.20 per hour on and after December 31, 2021.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors, such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at

any other time when he or she is free to leave the place of employment. Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.

§ 142-2.2 Overtime rate.

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 USC 201 et seq., the Fair Labor Standards Act of 1938, as amended, provided, however, that the exemptions set forth in section 13(a)(2) and (4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(2) and (4) of such act, overtime at a wage rate of one and one-half times the basic minimum hourly rate. The Fair Labor Standards Act is published in the United States Code, the official compilation of Federal statutes, by the Government Printing Office, Washington, DC. Copies of the Fair Labor Standards Act are available at the following office:

New York State Department of Labor
Counsel's Office
State Office Building Campus,
Building 12, Room 509
Albany, NY 12240-0005

The applicable overtime rate shall be paid for each workweek:

	<i>Non-residential employees</i>	<i>Residential employees</i>
For working time over	40 hours	44 hours

§ 142-2.3 Call-in pay.

An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.

§ 142-2.4 Additional rate for split shift and spread of hours.

An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required in this Part for any day in which:

- (a) the spread of hours exceeds 10 hours; or
- (b) there is a split shift; or
- (c) both situations occur.

§ 142-2.23 Student.

A *student* means an individual who is enrolled in and regularly attends a course of instruction at a state-licensed educational institution of learning leading to a degree, certificate or diploma, or who is completing residence requirements for a degree.

SUBPART 142-3

PROVISIONS APPLICABLE TO EMPLOYEES IN NONPROFITMAKING INSTITUTIONS WHICH HAVE NOT ELECTED TO BE EXEMPT FROM COVERAGE UNDER A MINIMUM WAGE ORDER

Sec.

MINIMUM WAGE AND REGULATIONS

- 142-3.1 Basic minimum hourly wage rate
- 142-3.2 Overtime rate
- 142-3.3 Call-in pay
- 142-3.4 Additional rate for split and spread of hours
- 142-3.5 Allowances
- 142-3.6 Employer payroll records requirements for nonprofitmaking institutions
- 142-3.7 Required personnel records for nonprofitmaking institutions
- 142-3.8 Statement to employee
- 142-3.9 Posting
- 142-3.10 Basis of wage payment
- 142-3.11 Deductions and expenses

DEFINITIONS

- 142-3.12 Employee
- 142-3.13 Nonprofitmaking institution
- 142-3.14 Regular rate
- 142-3.15 Split shift
- 142-3.16 Spread of hours
- 142-3.17 Meal
- 142-3.18 Lodging
- 142-3.19 Required uniform

MINIMUM WAGE AND REGULATIONS

§ 142-3.1 Basic minimum hourly wage rate.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) *New York City* for

(i) *Large employers* of eleven or more employees

\$11.00 per hour on and after December 31, 2016;
\$13.00 per hour on and after December 31, 2017;
\$15.00 per hour on and after December 31, 2018;

(ii) *Small employers* of ten or fewer employees

\$10.50 per hour on and after December 31, 2016;
\$12.00 per hour on and after December 31, 2017;

\$13.50 per hour on and after December 31, 2018;

\$15.00 per hour on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

\$10.00 per hour on and after December 31, 2016;

\$11.00 per hour on and after December 31, 2017;

\$12.00 per hour on and after December 31, 2018;

\$13.00 per hour on and after December 31, 2019;

\$14.00 per hour on and after December 31, 2020;

\$15.00 per hour on and after December 31, 2021,

(3) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

\$9.70 per hour on and after December 31, 2016;

\$10.40 per hour on and after December 31, 2017;

\$11.10 per hour on and after December 31, 2018;

\$11.80 per hour on and after December 31, 2019;

\$12.50 per hour on and after December 31, 2020;

\$13.20 per hour on and after December 31, 2021.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors. Such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer-- shall not be deemed to be permitted to work or required to be available for work:

(1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or

(2) at any other time when he or she is free to leave the place of employment.

Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more.

§ 142-3.2 Overtime rate.

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 *et seq.*, the Fair Labor Standards Act of 1938, as amended, provided, however that the exemptions set forth in section 13(a)(4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to section 13(a)(4) of such act, overtime at a wage rate of one and one-half times the basic minimum hourly rate. The Fair Labor Standards Act is published in the *United States Code*, the official compilation of Federal statutes, by the Government Printing Office, Washington, DC. Copies of the Fair Labor Standards Act are available at the following office:

New York State Department of Labor

Counsel's Office
State Office Building Campus
Building 12, Room 509
Albany, NY 12240-0005

The applicable overtime rate shall be paid for each workweek:

	<i>Non-residential employees</i>	<i>Residential employees</i>
For working time over	40 hours	44 hours

This provision shall not apply to residential house parents in children's homes.

§ 142-3.3 Call-in pay.

An employee who by request or permission of the employer reports for work on any day shall be paid for at least four hours, or the number of hours in the regularly scheduled shift, whichever is less, at the basic minimum hourly wage.

§ 142-3.4 Additional rate for split and spread of hours.

An employee shall receive one hour's pay at the basic minimum hourly wage rate, in addition to the minimum wage required herein for any day in which:

- (a) the spread of hours exceeds 10 hours;
- (b) there is a split shift; or
- (c) both situations occur.

§ 142-3.5 Allowances.

(a) *Allowances for meals, lodging and utilities for all employees except employees in children's camps.*

(1) Meals and lodging furnished by an employer to an employee may be considered a part of the minimum wage, but shall be valued at not more than:

(i) Meals, for work performed in

(a) *New York City* for

(1) *Large employers* of eleven or more employees

\$3.80 per meal on and after December 31, 2016;

\$4.50 per meal on and after December 31, 2017;

\$5.15 per meal on and after December 31, 2018;

(2) *Small employers* of ten or fewer employees

\$3.60 per meal on and after December 31, 2016;

\$4.15 per meal on and after December 31, 2017;

Exhibit 22

Paystub, Shao Ning MENG

March 26, 2020

Scharome Cares Inc
 Payroll Account
 1729 East 12th Street, FL 3
 Brooklyn, NY 11229
 (718) 434-0909

Personal Earning Statement



Empl# 40549 SS# [REDACTED] Department 200 Clock No.

SHAO NING MENG
 [REDACTED]

Pay Period: From: 03/14/2020 To: 03/20/2020
 Pay Date: 03/26/2020 Voucher No. 247875

Earnings	Department	Rate	Hours	Amount	YTDHrs	YTDAmnt
Live In HourHHA		15.00	26.00	390.00	200.00	3900.00
Live In HolidHHA					26.00	390.00
SOHREG HHA		0.00	0.00	30.00	0.00	330.00
Total Gross Pay			26.00	420.00	286.00	4620.00

Taxes	Exemptions	Addl.	Amount	Year-To-Date
Social Sec.			26.04	286.44
Medicare			6.09	67.01
Federal	Married - 3		0.00	0.00
NY State	Married - 3		8.61	77.49
NY Local	Married - 3		6.44	61.76
NY Paid Leave			1.13	12.45
NY Disability			0.60	7.80
Total Taxes			48.91	\$512.95

Direct Deposits	ABA No.	Account No.	Amount
	XXXXX0021	XXXXX8808	371.09
Total Direct Deposit			371.09

Net Pay \$371.09

Time Punches	In	Out	In	Out	Total
Wed 03/18	08:57AM	08:57AM			13.00
Thu 03/19	09:01AM	08:46AM			13.00

Important Notes

▼ REMOVE DOCUMENT ALONG THIS PERFORATION ▼

THIS IS NOT A CHECK

DOCUMENT CONTAINS BLUE PANTOGRAPH & MICROPRINTING. BACK HAS THERMOCHROMIC INK & WATERMARK. TOLL FREE 1-800-451-1010. VOID IF NOT PRESENT.

Exhibit 23

Paystub, Xiao Huan YU

January, 2018

Chinese-American Planning Council

1 York Street, 2nd Floor, New York, NY 10013 (212) 219-8100

XIAO HUAN YU

Voucher Number 250072 Pay Date 01/26/2018

Emp Id		Loc		Period Begin	01/06/18	Net Pay	653.79
SSN	XXX-XX-3430	Hire Date	07/25/05	Period End	01/19/18	Dir Dep	653.79
Clock		Status	A	Check Type	Reg	Net Check	

Earnings	Rate	Hours	Amount	YTD Hours	YTD Amount	Hours Begin Date	Rate	Customers
Holiday Premium			169.00		481.00	13.00 01/08/2018	13.0000	
Extra Hours Live-in				24.00	312.00	13.00 01/09/2018	13.0000	
PTO MCO HRA Payout				54.78	602.58	13.00 01/15/2018	13.0000	
Regular MCO	13.0000	52.00	676.00	104.00	1300.00	13.00 01/16/2018	13.0000	
Total Earnings		52.00	845.00	182.78	2695.58			
Deductions			Amount	YTD Amount				
Health Pretax			10.00		20.00			
Union Dues					32.00			
Total Deductions			10.00		52.00			
Taxes	Status	Taxable	Amount	YTD Taxable	YTD Amount			
Federal Income Tax	S-0	835.00	75.80	2675.58	289.49			
Medicare		835.00	12.11	2675.58	38.80			
New York SITW	S-0	835.00	24.01	2675.58	85.06			
New York, NY (Res)	S-0	835.00	17.52	2675.58	60.67			
OASDI		835.00	51.77	2675.58	165.89			
Total Taxes			181.21		639.91			
Direct Deposits	Account	Amount						
	***1530	653.79						
Total Direct Deposits		653.79						

READ BELOW NOTE

Attention all employees, as of 04/10/2015, there will be only one combine paycheck for all programs

Chinese-American Planning Council

1 York Street, 2nd Floor, New York, NY 10013 (212) 219-8100

XIAO HUAN YU

Voucher Number 253584 Pay Date 02/09/2018

Emp Id		Loc		Period Begin	01/20/18	Net Pay	591.86
SSN	XXX-XX-3430	Hire Date	07/25/05	Period End	02/02/18	Dir Dep	591.86
Clock		Status	A	Check Type	Reg	Net Check	

Earnings	Rate	Hours	Amount	YTD Hours	YTD Amount	Hours Begin Date	Rate	Customers
Holiday Premium					481.00	9.75 01/15/2018	13.0000	livein extra
Extra Hours Live-in	13.0000	9.75	126.75	33.75	438.75	13.00 01/22/2018	13.0000	
PTO MCO HRA Payout				54.78	602.58	13.00 01/23/2018	13.0000	
Regular MCO	13.0000	52.00	676.00	156.00	1976.00	13.00 01/29/2018	13.0000	
Total Earnings		61.75	802.75	244.53	3498.33	13.00 01/30/2018	13.0000	
Deductions			Amount	YTD Amount				
Health Pretax			10.00		30.00			
Union Dues			32.00		64.00			
Total Deductions			42.00		94.00			
Taxes	Status	Taxable	Amount	YTD Taxable	YTD Amount			
Federal Income Tax	S-0	792.75	70.73	3468.33	360.22			
Medicare		792.75	11.49	3468.33	50.29			
New York SITW	S-0	792.75	21.67	3468.33	106.73			
New York, NY (Res)	S-0	792.75	15.85	3468.33	76.52			
OASDI		792.75	49.15	3468.33	215.04			
Total Taxes			168.89		808.80			
Direct Deposits	Account	Amount						
	***1530	591.86						
Total Direct Deposits		591.86						

READ BELOW NOTE

Attention all employees, as of 04/10/2015, there will be only one combine paycheck for all programs

24时结束

Exhibit 24

Labor Standards Complaint Form,

Belkis CID DE BRUNO

March 21, 2022

Division of Labor Standards
Harriman State Office Campus
Building 12, Room 266B
Albany, NY 12240

WE ARE YOUR DOL



Department
of Labor

www.labor.ny.gov

Office Use Only:	
LS ID	_____
LCM	_____
PV <input type="checkbox"/> Priority	_____
Taken by	_____
Date	_____

Labor Standards Complaint Form

Use this form to claim unpaid wages, illegal deductions, wage supplements, minimum wage, overtime, no meal period, etc.

Note: This complaint form is available in languages other than English. Anyone working in New York State may make a complaint to the New York State Department of Labor. Be sure to read Information About Filing a Claim (LS223.2) before filling out this form.

Please answer all questions for each part related to your claim. Providing complete information helps us review your complaint and accept it for investigation. Return your completed form to the address above.

We will contact you if we do not have enough information to proceed or if your claim appears invalid. If you have questions about how to complete this form call (888) 469-7365.

We cannot accept the following wage or supplement claims:

- For work performed outside of New York State.
- From anyone employed in an administrative, executive, or professional capacity who earns over \$900 gross per week (they are excluded from coverage under Sections 190[7] and 198-c[3]).
- From individuals employed by a public entity such as a town, county, or city.
- From individuals who are in business for themselves.
- For work performed on a public work project (use form PW-4).

Part 1. Person Filing Claim (Employee/Complainant Information)

1. Name:(first) Belkis (middle) _____ (last) Cid de Bruno

2. Another name known by at work: _____

3. Mailing address: No. _____ Street: _____ Apt. # _____
 City/town: Bronx County: Bronx State: NY Zip code: 10451

4. Phone: _____ 5. Other phone:(_____) _____

6. Email: _____ 7. Your primary/preferred language: Chinese

Part 2. Claim Filed Against (Business/Business Owner Information)

8a. Business name: Royal Care

8b. Legal name (if different): Royal Care Certified Home Health Care

8c. Legal entity type: Individual LLC Partnership Corporation Other: _____

8d. Mailing address: No.: 6323 Street: 14th Avenue Fl/Rm/Suite#: _____
 City/town: Brooklyn County: Kings State: NY Zip code: 11219

8e. Business phone: (718) 851-3800 8f. Email: _____

- 9a. Owner(s) name(s) and title(s): _____

- 9b. Mailing address: No.: _____ Street: _____ Apt. #: _____
 City/town: _____ County: _____ State: _____ Zip code: _____
- 9c. Owner phone: (_____) _____ 9d. Email: _____
10. Business type: restaurant retail store domestic help construction office other: home care
11. Business hours of operation: _____ 12. Total # of employees: _____
- 13a. Is the company still in business? Yes No 13b. If "No," when did business close? _____
14. Employer's bank name and location (attach copy of check or check stub): _____
15. Has the employer filed for bankruptcy? Yes No Unknown

Part 3. Person Filing Claim (Employment Information)

16. Your job title: Home Health Aide 17. Type of work you performed: caring for sick and infirmed in their homes
18. Date hired: 6/5/2015 19. Name and title of person who hired you: _____
20. Name/s of your manager/supervisor/foreman: _____
21. Name of person who paid your wages: _____
22. Worksite address: No.: _____ Street: (Patient's home, see Part 11) Fl/Rm/Suite#: _____
 City/town: _____ County: _____ State: _____ Zip code: _____
23. Did you regularly travel outside New York State for work? Yes No
24. Your relationship with business: Still employed Discharged Quit Temporarily laid-off
- 25a. Last day worked: _____ 25b. Reason for leaving: _____
- 26a. Were you a member of a union? Yes No 26b. If "Yes," union name and Local no.: _____
- 27a. Your rate of pay: \$ varied per Day Week Hour Other _____
- 27b. Your overtime rate of pay: \$ varied
- 28a. Did you earn tips on a regular basis? Yes No 28b. If "Yes," how much on average per hour? _____
- 28c. Has your employer kept your or any other employee's tips? No Yes – yours Yes – others'
- 28d. If "Yes," how much? Please Explain: _____
- 29a. What was your payday? Mon Tues Wed Thurs Fri Sat Sun
- 29b. What period did this cover? (e.g. Sat through Fri) _____
30. How often were you paid? Daily Weekly Every two weeks Other _____
31. How were your wages paid? Cash Check Direct Deposit Pay Card
 Combination: (please explain - e.g. part in cash and part by check) _____
- 32a. Were you required to wear a uniform? Yes No 32b. If "Yes," describe the uniform: _____
- 32c. Were uniforms free of charge? Yes No 32d. If "No," how were uniforms purchased and how much did they cost? _____

Part 4. Unpaid Wages Claim

Fill in this section if you are owed wages (see Part 6 if you are due overtime pay). Use one row for each week. Gross wages mean the amount earned before taxes or other deductions. Attach a separate sheet(s) for additional weeks, or to give more information.

A. Payroll Week Ending Date	B. Number of Days Worked in the Week	C. Hours Worked in the Week	D. Rate of Pay (Earned or Promised)	E. Illegal Deductions from Wages (e.g. fines, breakage, etc.)	F. Gross Wages Owed for the Week	G. Gross Wages Paid (If employer paid some of the wages owed write the amount here)	H. Difference Between Gross Wages Owed and Gross Wages Paid
Ex.: 4/4/2017	7	35	\$16.00 per hour		\$560 (CxD)	\$0	\$560 (F-G)
I. Total							

33a. If your paycheck was not honored by the bank, please provide check number and payroll week ending date. If available, provide a copy of the check: _____

33b. Claim Range: What time period does your wage claim cover?
 Date from: March 2016 to: Present

Part 5. Unpaid Paid Sick Leave

Fill in this section for Paid Sick Leave you are owed. Section 196-b of the New York State Labor law requires employers with five or more employees or net income of more than \$1 million to provide paid sick leave to employees. On September 30, 2020, covered employees in New York State began to accrue leave at a rate of one hour for every 30 hours worked. On January 1, 2021, employees may start using accrued leave.

A. Time Period Paid Sick Leave Accrued	B. Amount of Paid Sick Leave Accrued	C. Date(s) when Paid Sick Leave used	D. Amount of Benefit Time Owed	E. Regular Rate of Pay	F. Amount of Benefit Payment Due
Ex.: 9/30/20-1/8/21	16.5 hours	1/11/21	8 hours	\$20/hour	\$160
G. Total					

Part 6. Unpaid Wage Supplement Claim

Fill in this section for wage supplements you are owed. Wage supplements are fringe benefit payments promised by the employer such as: vacation pay, expenses, and holiday pay, etc.

34. Explain the benefits promised or attach a copy of the written policy/handbook: _____

A. Type of Benefit Owed	B. Time Period Benefit Earned	C. Date Benefit Payment Due	D. Amount of Benefit Time Owed	E. Amount of Benefit Payment Due	F. Benefit Promised by:
Ex.: Vacation pay	1/1/16–12/31/16	1/1/17	1 week	\$700	<input checked="" type="checkbox"/> written policy <input type="checkbox"/> verbal promise
					<input type="checkbox"/> written policy <input type="checkbox"/> verbal promise
					<input type="checkbox"/> written policy <input type="checkbox"/> verbal promise
					<input type="checkbox"/> written policy <input type="checkbox"/> verbal promise
G. Total					

Part 7. Unpaid Minimum Wage or Overtime Claim

Fill in this section if you were paid below the State Minimum Hourly Wage and/or you were not paid overtime, or if you are owed extra pay for working 2 shifts in one day, or for working more than 10 hours in one day. Most employees must be paid at least the minimum wage and time and ½ if they work more than 40 hours per week.

- 35a. Are you paid the minimum wage for each hour worked? Yes No
- 35b. Are you paid time and ½ for the hours worked over 40? Yes No
- 35c. Are you paid any wages for the hours worked over 40? Yes No 35d. If "Yes," how much per hour? _____
- 35e. Are you paid an extra hour for working 2 shifts in one day or for working more than 10 hours in one day?
 Yes No
- 35f. If "No" to any of the above, please explain and fill in the schedule of your work week below: see Part 11

A. Workday	B. Time Workday Started	C. Time Workday Ended	D. Time off for Meals	E. Total Hours
Example	10:00 am	11:00 pm	30 min	12.5 hours
Sunday	:	:		
Monday	:	:		
Tuesday	:	:		
Wednesday	:	:		
Thursday	:	:		
Friday	:	:		
Saturday	:	:		
F. Weekly Total				

- 36a. Are the hours worked listed above the same every week? Yes No
- 36b. If "No," please provide your estimate of average number of hours worked per week: _____
- 36c. Are you owed call-in pay, or uniform maintenance pay? If yes, please explain and provide dates.

36d. Claim Range: What time-period does your minimum wage or overtime claim cover?
Date from: March 2016 to: Present

36e. Provide information on your regular and overtime rates of pay during the above claim range.

Date from: _____	to: _____
Regular: \$ _____ per _____	Overtime: \$ _____ per _____
Date from: _____	to: _____
Regular: \$ _____ per _____	Overtime: \$ _____ per _____
Date from: _____	to: _____
Regular: \$ _____ per _____	Overtime: \$ _____ per _____

Part 8. Non-Wage Complaint

Check those that apply if you want to make a non-wage related complaint. Check all that apply. Please explain and provide an additional sheet if needed.

The employer failed to:

- 37a. Provide a 30-minute meal period _____
Were you paid for the time worked when the employer failed to provide the meal period? Yes No
- 37b. Provide a wage statement (pay stub) _____
- 37c. Provide a day of rest _____
- 37d. Provide payment of employee wages by at least one of these permissible methods: Cash/Check/
Direct Deposit/Payroll Debit Card (Pay Card) _____
- 37e. Obtain written employee authorization for payment of wages by Direct Deposit or Payroll Debit Card.

- 37f. Provide a termination notice _____
- 37g. Provide a notice of pay rate with all required information _____
- 37h. Pay wages on time _____
- 37i. Pay wages "on the books" _____
- 37j. Provide for accrual of required New York State Paid Sick Leave _____
- 37k. Post required notices/Minimum Wage Poster _____
- 37l. Follow rules for employment of minors (under 18) _____
- 37m. Other _____

Part 9. Claim Background

- 38a. Did you ask for your wages? Yes No
- 38b. If "Yes," please explain. Who and when did you ask, and what happened?

38c. Have you already taken action, such as filing in small claims court or a lawsuit, to recover your wages?

Yes No

38d. If "Yes," please explain: _____

Part 10. Retaliatory Action

39a. Did you complain to your employer about this or another labor law violation? Yes No

39b. If "Yes," what happened? _____

39c. Do you now want to file a retaliation claim against this employer? Yes No

Part 11. Claim Assistance

40a. Do you have a representative (e.g. private attorney, advocacy group)? Yes No

40b. If "Yes," provide name of person or group: NMASS

40c. Has this representative assisted you in filing this claim? Yes No

40d. Have you paid, or do you plan to pay, this representative? Yes No

40e. Do you want us to speak with this representative about your claim? Yes No
If so, representatives must submit a Letter of Representation (LS 11).

40f. Did anyone, other than the representative, help you fill out this form? Yes No

40g. If "Yes," who helped you and why did they help you? _____

Additional Comments/Useful Information:

See attached.

I certify the above information is true to the best of my knowledge, and I am aware there are penalties for making false statements. I authorize the Commissioner of Labor, deputies or agents to receive, endorse my name on, and deposit in the account of the Commissioner of Labor any checks or money orders made out to me as payment on this claim. I will notify the New York State Department of Labor if my contact information changes.

~~ROYAL CAREY~~ Belkiz A CID de ARRIVO 3/21/2022
Claimant Signature Date

Return your completed form to the address on Page 1.

PART 11 - Additional Comments/Useful Information:

From September 2016 to September 2018, Claimant worked 24 hour shifts 3 days a week caring for a 78 year old woman. The Patient had Alzheimer's, diabetes, high blood pressure, seizures, was deaf, was bed-bound, used a walker/wheelchair and used breathing equipment. Claimant typically had to get up 5 times a night to care for the Patient, including turning and repositioning her every 2 hours as directed by the Patient's care plan. Claimant also assisted the Patient with her diapers 4 times a night. Claimant also had to get up to monitor the Patient's safety at night, including waking up and watching the Patient and assisting the Patient with getting up. Claimant was unable to get 5 uninterrupted hours of sleep.

From January 15, 2022 to February 5th, 2022, Claimant worked 24 hour shifts 3 days a week caring for a 92 year old woman. The Patient was bed bound. Claimant typically had to get up 5 times a night to care for the Patient, including turning and repositioning her every 2 hours as directed by the Patient's care plan. Claimant also had to get up to monitor the Patient's safety at night, including cooking, feeding and providing water to the Patient and cleaning the Patient's bed and clothing. Claimant was unable to get 5 uninterrupted hours of sleep.

Summary. During the aforementioned periods, for every 24-hour shift worked, Claimant only received 13 hours of pay.

3.11.2022 - Cooperative

Division of Labor Standards
Harriman State Office Campus
Building 12, Room 266B
Albany, NY 12240

WE ARE YOUR DOL



Office Use Only:	
LS ID	_____
LCM	_____
PV <input type="checkbox"/> Priority	_____
Taken by	_____
Date	_____

Labor Standards Complaint Form

Use this form to claim unpaid wages, illegal deductions, wage supplements, minimum wage, overtime, no meal period, etc.

Note: This complaint form is available in languages other than English. Anyone working in New York State may make a complaint to the New York State Department of Labor. Be sure to read Information About Filing a Claim (LS223.2) before filling out this form.

Please answer all questions for each part related to your claim. Providing complete information helps us review your complaint and accept it for investigation. Return your completed form to the address above.

We will contact you if we do not have enough information to proceed or if your claim appears invalid. If you have questions about how to complete this form call (888) 469-7365.

We cannot accept the following wage or supplement claims:

- For work performed outside of New York State.
- From anyone employed in an administrative, executive, or professional capacity who earns over \$900 gross per week (they are excluded from coverage under Sections 190[7] and 198-c[3]).
- From individuals employed by a public entity such as a town, county, or city.
- From individuals who are in business for themselves.
- For work performed on a public work project (use form PW-4).

Part 1. Person Filing Claim (Employee/Complainant Information)

1. Name:(first) Belkis (middle) _____ (last) Cid De Bruno

2. Another name known by at work: _____

3. Mailing address: No. ██████████ Street: ██████████ Apt. # ██████████
 City/town: Bronx County: Bronx State: NY Zip code: 10451

4. Phone: (██████████) _____ 5. Other phone:(_____) _____

6. Email: _____ 7. Your primary/preferred language: Chinese

Part 2. Claim Filed Against (Business/Business Owner Information)

8a. Business name: Cooperative Home Care

8b. Legal name (if different): Cooperative Home Care Associates Inc

8c. Legal entity type: Individual LLC Partnership Corporation Other: _____

8d. Mailing address: No.: 400 Street: East Fordham Road Fl/Rm/Suite#: Fl 13
 City/town: Bronx County: Bronx State: NY Zip code: 10458

8e. Business phone: (718) 993-7104 8f. Email: _____

9a. Owner(s) name(s) and title(s): Michael Elsas, CEO

9b. Mailing address: No.: 400 Street: East Fordham Road Apt. #: Fl 13
City/town: Bronx County: Bronx State: NY Zip code: 10458

9c. Owner phone: (____) _____ 9d. Email: _____

10. Business type: restaurant retail store domestic help construction office other: home care

11. Business hours of operation: _____ 12. Total # of employees: _____

13a. Is the company still in business? Yes No 13b. If "No," when did business close? _____

14. Employer's bank name and location (attach copy of check or check stub): _____

15. Has the employer filed for bankruptcy? Yes No Unknown

Part 3. Person Filing Claim (Employment Information)

16. Your job title: Home Health Aide 17. Type of work you performed: caring for sick and infirmed in their homes

18. Date hired: _____ 19. Name and title of person who hired you: _____

20. Name/s of your manager/supervisor/foreman: _____

21. Name of person who paid your wages: _____

22. Worksite address: No.: _____ Street: (Patient's home, see Part 11) Fl/Rm/Suite#: _____

City/town: _____ County: _____ State: _____ Zip code: _____

23. Did you regularly travel outside New York State for work? Yes No

24. Your relationship with business: Still employed Discharged Quit Temporarily laid-off

25a. Last day worked: _____ 25b. Reason for leaving: _____

26a. Were you a member of a union? Yes No 26b. If "Yes," union name and Local no.: SEIU 1199

27a. Your rate of pay: \$ varied per Day Week Hour Other _____

27b. Your overtime rate of pay: \$ varied

28a. Did you earn tips on a regular basis? Yes No 28b. If "Yes," how much on average per hour? _____

28c. Has your employer kept your or any other employee's tips? No Yes – yours Yes – others'

28d. If "Yes," how much? Please Explain: _____

29a. What was your payday? Mon Tues Wed Thurs Fri Sat Sun

29b. What period did this cover? (e.g. Sat through Fri) _____

30. How often were you paid? Daily Weekly Every two weeks Other _____

31. How were your wages paid? Cash Check Direct Deposit Pay Card

Combination: (please explain - e.g. part in cash and part by check) _____

32a. Were you required to wear a uniform? Yes No 32b. If "Yes," describe the uniform: _____

32c. Were uniforms free of charge? Yes No 32d. If "No," how were uniforms purchased and how much did they cost? _____

Part 4. Unpaid Wages Claim

Fill in this section if you are owed wages (see Part 6 if you are due overtime pay). Use one row for each week. Gross wages mean the amount earned before taxes or other deductions. Attach a separate sheet(s) for additional weeks, or to give more information.

A. Payroll Week Ending Date	B. Number of Days Worked in the Week	C. Hours Worked in the Week	D. Rate of Pay (Earned or Promised)	E. Illegal Deductions from Wages (e.g. fines, breakage, etc.)	F. Gross Wages Owed for the Week	G. Gross Wages Paid (If employer paid some of the wages owed write the amount here)	H. Difference Between Gross Wages Owed and Gross Wages Paid
Ex.: 4/4/2017	7	35	\$16.00 per hour		\$560 (CxD)	\$0	\$560 (F-G)
I. Total							

33a. If your paycheck was not honored by the bank, please provide check number and payroll week ending date. If available, provide a copy of the check: _____

33b. Claim Range: What time period does your wage claim cover?
 Date from: March 2016 to: Present

Part 5. Unpaid Paid Sick Leave

Fill in this section for Paid Sick Leave you are owed. Section 196-b of the New York State Labor law requires employers with five or more employees or net income of more than \$1 million to provide paid sick leave to employees. On September 30, 2020, covered employees in New York State began to accrue leave at a rate of one hour for every 30 hours worked. On January 1, 2021, employees may start using accrued leave.

A. Time Period Paid Sick Leave Accrued	B. Amount of Paid Sick Leave Accrued	C. Date(s) when Paid Sick Leave used	D. Amount of Benefit Time Owed	E. Regular Rate of Pay	F. Amount of Benefit Payment Due
Ex.: 9/30/20-1/8/21	16.5 hours	1/11/21	8 hours	\$20/hour	\$160
G. Total					

Part 6. Unpaid Wage Supplement Claim

Fill in this section for wage supplements you are owed. Wage supplements are fringe benefit payments promised by the employer such as: vacation pay, expenses, and holiday pay, etc.

34. Explain the benefits promised or attach a copy of the written policy/handbook: _____

A. Type of Benefit Owed	B. Time Period Benefit Earned	C. Date Benefit Payment Due	D. Amount of Benefit Time Owed	E. Amount of Benefit Payment Due	F. Benefit Promised by:
Ex.: Vacation pay	1/1/16-12/31/16	1/1/17	1 week	\$700	<input checked="" type="checkbox"/> written policy <input type="checkbox"/> verbal promise
					<input type="checkbox"/> written policy <input type="checkbox"/> verbal promise
					<input type="checkbox"/> written policy <input type="checkbox"/> verbal promise
					<input type="checkbox"/> written policy <input type="checkbox"/> verbal promise
G. Total					

Part 7. Unpaid Minimum Wage or Overtime Claim

Fill in this section if you were paid below the State Minimum Hourly Wage and/or you were not paid overtime, or if you are owed extra pay for working 2 shifts in one day, or for working more than 10 hours in one day. Most employees must be paid at least the minimum wage and time and ½ if they work more than 40 hours per week.

35a. Are you paid the minimum wage for each hour worked? Yes No

35b. Are you paid time and ½ for the hours worked over 40? Yes No

35c. Are you paid any wages for the hours worked over 40? Yes No 35d. If "Yes," how much per hour? _____

35e. Are you paid an extra hour for working 2 shifts in one day or for working more than 10 hours in one day?

Yes No

35f. If "No" to any of the above, please explain and fill in the schedule of your work week below: see Part 11

A. Workday	B. Time Workday Started	C. Time Workday Ended	D. Time off for Meals	E. Total Hours
Example	10:00 am	11:00 pm	30 min	12.5 hours
Sunday	:	:		
Monday	:	:		
Tuesday	:	:		
Wednesday	:	:		
Thursday	:	:		
Friday	:	:		
Saturday	:	:		
F. Weekly Total				

- 36a. Are the hours worked listed above the same every week? Yes No
- 36b. If "No," please provide your estimate of average number of hours worked per week: _____
- 36c. Are you owed call-in pay, or uniform maintenance pay? If yes, please explain and provide dates.

36d. Claim Range: What time-period does your minimum wage or overtime claim cover?
Date from: March 2016 to: Present

36e. Provide information on your regular and overtime rates of pay during the above claim range.

Date from: _____	to: _____
Regular: \$ _____ per _____	Overtime: \$ _____ per _____
Date from: _____	to: _____
Regular: \$ _____ per _____	Overtime: \$ _____ per _____
Date from: _____	to: _____
Regular: \$ _____ per _____	Overtime: \$ _____ per _____

Part 8. Non-Wage Complaint

Check those that apply if you want to make a non-wage related complaint. Check all that apply. Please explain and provide an additional sheet if needed.

The employer failed to:

- 37a. Provide a 30-minute meal period _____
Were you paid for the time worked when the employer failed to provide the meal period? Yes No
- 37b. Provide a wage statement (pay stub) _____
- 37c. Provide a day of rest _____
- 37d. Provide payment of employee wages by at least one of these permissible methods: Cash/Check/
Direct Deposit/Payroll Debit Card (Pay Card) _____
- 37e. Obtain written employee authorization for payment of wages by Direct Deposit or Payroll Debit Card.

- 37f. Provide a termination notice _____
- 37g. Provide a notice of pay rate with all required information _____
- 37h. Pay wages on time _____
- 37i. Pay wages "on the books" _____
- 37j. Provide for accrual of required New York State Paid Sick Leave _____
- 37k. Post required notices/Minimum Wage Poster _____
- 37l. Follow rules for employment of minors (under 18) _____
- 37m. Other _____

Part 9. Claim Background

- 38a. Did you ask for your wages? Yes No
- 38b. If "Yes," please explain. Who and when did you ask, and what happened?

38c. Have you already taken action, such as filing in small claims court or a lawsuit, to recover your wages?

Yes No

38d. If "Yes," please explain: _____

Part 10. Retaliatory Action

39a. Did you complain to your employer about this or another labor law violation? Yes No

39b. If "Yes," what happened? _____

39c. Do you now want to file a retaliation claim against this employer? Yes No

Part 11. Claim Assistance

40a. Do you have a representative (e.g. private attorney, advocacy group)? Yes No

40b. If "Yes," provide name of person or group: NMASS

40c. Has this representative assisted you in filing this claim? Yes No

40d. Have you paid, or do you plan to pay, this representative? Yes No

40e. Do you want us to speak with this representative about your claim? Yes No
If so, representatives must submit a Letter of Representation (LS 11).

40f. Did anyone, other than the representative, help you fill out this form? Yes No

40g. If "Yes," who helped you and why did they help you? _____

Additional Comments/Useful Information:

See attached.

I certify the above information is true to the best of my knowledge, and I am aware there are penalties for making false statements. I authorize the Commissioner of Labor, deputies or agents to receive, endorse my name on, and deposit in the account of the Commissioner of Labor any checks or money orders made out to me as payment on this claim. I will notify the New York State Department of Labor if my contact information changes.

Beltis A CID de BRUNO
Claimant Signature

Date

Return your completed form to the address on Page 1.

PART 11 - Additional Comments/Useful Information:

From March 2014 to September 2019, Claimant worked 24 hour shifts 3 days a week caring for a woman in her 80s. The Patient had Alzheimers', diabetes, seizures, Parkinson's, was deaf, was bed-bound, used a walker and used abusive language and behavior against the Claimant. Claimant typically had to get up 6 times a night to care for the Patient, including turning and repositioning her every 2 hours as directed by the Patient's care plan. Claimant also assisted the Patient with her diapers 4 times a night. Claimant also had to get up to monitor the Patient's safety at night, including waking up and watching the Patient and cleaning the Patient's bed and clothing. Claimant was unable to get 5 uninterrupted hours of sleep.

From April 7th, 2021 to the Present, Claimant has worked 24 hour shifts 3 days a week caring for a woman in her 80s. The Patient has Alzheimers', diabetes, seizures, Parkinson's, is blind and deaf, uses a walker/wheelchair and uses abusive language and behavior against the Claimant. Claimant typically had to get up 5 times a night to care for the Patient, including turning and repositioning her every 2 hours as directed by the Patient's care plan. Claimant also assists the Patient with going to the bathroom 3 times a night. Claimant also has to get up to monitor the Patient's safety at night, including waking up and watching the Patient, assisting the Patient with getting up, cooking, feeding and providing water to the Patient and cleaning the Patient's bed and clothing. Claimant was unable to get 5 uninterrupted hours of sleep.

Summary. During the aforementioned periods, for every 24-hour shift worked, Claimant only received 13 hours of pay.

Exhibit 25

Claim Letter to New York State Department of Labor Regarding First Chinese Presbyterian Community Affairs Home Attendant Corporation

January 8, 2020

January 8, 2020

Blaine (Fin) V. Fogg
President

BY EMAIL: Labor.sm.LSClaim.Intake@labor.ny.gov

Janet E. Sabel
*Attorney-in-Chief
Chief Executive Officer*

New York State Department of Labor
Division of Labor Standards
State Campus, Building 12
Albany, NY 12240

Adriene L. Holder
*Attorney-in-Charge
Civil Practice*

Re: Claims of Unpaid Wages, Overtime and Spread of Hours – Maria Rodriguez

To Whom This May Concern:

The Legal Aid Society represents Maria Rodriguez, who was been employed by First Chinese Presbyterian Community Affairs Home Attendant Corporation (“FCP”) since 2002. Since March 2016, Ms. Rodriguez has been working 24-hour shifts, caring for a woman in her nineties who suffers from Alzheimer’s/dementia and requires assistance with walking.¹ For approximately one year, Ms. Rodriguez was scheduled for three consecutive, 24-hour shifts per week; since some time in 2017, Ms. Rodriguez has been scheduled for two consecutive, 24-hour shifts per week. Ms. Rodriguez’s patient suffers from severe confusion and paranoia as a result of her medical conditions and generally does not sleep at night, often staying awake and active until as late as 1 a.m. Ms. Rodriguez is required to monitor her patient at all times to ensure that her patient does not leave the apartment alone and unsupervised or slip and fall while wandering around her home. Ms. Rodriguez also assists her patient with toileting at often as ten times per night. Ms. Rodriguez is provided with a bed placed directly next to her patient’s bed in which to sleep. However, Ms. Rodriguez never receives five hours of continuous and uninterrupted sleep when working her 24-hour shifts. Ms. Rodriguez never receives three hours of duty-free meal breaks per shift.

Despite having consistent duties that prevent her from obtaining five hours of continuous and uninterrupted sleep and three hours of meal breaks per shift, Ms. Rodriguez has only ever received 13 hours of pay for every 24-hour shift. She now submits this wage claim seeking unpaid wages, overtime, spread of hours pay, liquidated damages, and other damages related to FCP’s failure to provide full and accurate paystubs in accordance with the Minimum Wage Order for Miscellaneous Industries and Occupations and the New York Labor Law.

Sincerely,



Carmela Huang
Supervising Attorney

¹ Ms. Rodriguez is partnered on this assignment with Luisa Velazquez, who submitted her own wage claim on January 7, 2020.

Exhibit 26

**First Chinese Presbyterian Community
Affairs Home Attendant Corporation
Home Attendant Handbook**

April, 2019

(excerpted)

**FIRST CHINESE PRESBYTERIAN COMMUNITY AFFAIRS
HOME ATTENDANT CORPORATION
中華基督教長老會家庭護理中心**



Home Attendant Handbook

subject to investigation that may lead to progressive disciplinary action, up to employment termination.



POLICIES AND PROCEDURES FOR "LIVE-IN" SERVICES

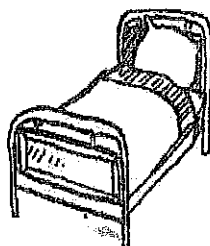
1. All employees assigned to a "live-in" case MUST sign off on FCP's live-in agreement as a condition of working "live-in" shifts.
2. All employees must familiarize themselves with the agency's live-in policy.
3. All clients are assessed by HRA or a managed care entity as a case that can be safely maintained and serviced in the community through live-in service authorizations. This means that the consumer's medical condition only requires the employee to perform care activities for, at most, 13 hours during a 24-hour period.
4. A live-in shift is 24 hours. The shift is comprised of:
 - a. 13 hours of care
 - b. 8 hours of sleep/rest time, including 5 hours of uninterrupted sleep
 - c. 3 hours of duty-free meal times
5. The total work time required to perform all tasks on the Care Plan of a live-in case shall not exceed thirteen (13) hours of work per shift. If the working time exceeds thirteen (13) hours, employees must inform their Case Coordinator immediately (no later than 24 hours after the end of his/her shift) because the consumer's medical condition may require a change in service authorizations.
6. Employees must take advantage of every opportunity that they can to get 5 hours of uninterrupted sleep. For example, if a client goes to sleep early, likewise, the employee should go to sleep early. There may be clients who routinely sleep only during the day, but not at night. In that case, the employee would take his or her sleep break during the day and would be notified by FCP of this particular client need in advance of assignment of the case.
7. The employee should take his/her meal periods during the client's quiet time. For example, the employee should take his/her meal breaks following the completion of a client's meal and/or when the client is engaged in an activity that does not require the employee's assistance such as watching TV or resting in bed.
8. All employees MUST understand that the conduct of their duties and responsibilities in servicing a "live-in" consumer is based on the client's "Plan of Care".
9. If employees are asked to perform additional duties outside of the client's Plan of Care, they must report the additional functions they are performing to their respective Case Coordinators immediately before they perform any such tasks as this may require a nursing visit to review the client's Plan of Care.
10. All live-in employees MUST use the Sandata system to record attendance and in between call of duty during meal periods and sleep time. Except in an emergency, there must be verifiable "clock-in" and "clock-out" entries into the Sandata system, reflecting when the employee started and completed his/her tasks.
11. When clocking out from a live-in case, all live-in employees must still encode the normal task that they routinely do. This will ensure that employees are paid properly for all of their work hours.
12. Additionally, all employees MUST strictly follow the Sandata procedures on the use of the 900 task code when clocking out from ALL "live-in" case assignments. This will ensure employees are paid properly for all hours worked.
 - a. 915: I did receive my agreed upon breaks
Enter 1 for yes 2 for no
 - b. 916: I did receive a total of 8 hours of rest time
Enter 1 for yes 2
 - c. 917: I did receive 5 hours of uninterrupted rest time
Enter 1 for yes
13. The following procedures MUST be strictly followed when employee reports intermittent care during their planned sleep and meal periods.
 - a. If a client wakes up employee during the employee's 5 hours of uninterrupted sleep, except in an emergency, the employee must accurately clock in the time that this happened as well as the type of task activity that the employee was asked to perform that interrupted their sleep.
 - b. Following the completion of the task, the employee must immediately clock out his/her task completion.
 - c. If the client's needs prevent employee from taking 3 hours of duty free meal periods, he/she must accurately clock in the time that this happened as well as the type of task activity that the employee was asked to perform that interrupted their duty free meal break.
 - d. In addition to electronically recording interrupted sleep and/or not receiving 3 hours of duty free meal breaks, employees MUST call their respective Case Coordinators within 24 hours to report sleep/meal interruptions to the Case Coordinator.
 - e. When Case Coordinators receive a report about an employee's claim they did not receive 8 hours of sleep (including 5 hours of uninterrupted sleep/rest)

and/or 3 hour duty free meal periods, CCs will instruct the employee to start a daily log documenting the tasks the employee had to do that interrupted his/her sleep or meals, and the date, time and length of time it took to care for the client's needs.

- f. FCP will gather a minimum of a 5-day log to direct an FCP nurse to conduct a visit and re-evaluate the client's service needs.
- g. If the overall evaluation of the FCP nurse warrants an increase in service hours, (live-in to split shift hours), then the client's care oversight is spoken to about the need for the client to be seen by the client's primary care physician for a medical re-evaluation.
- h. A nursing supervision report will then be prepared and faxed to the insurance carrier indicating clinical findings and basis to recommend a higher level of care.
- i. As FCP awaits the insurance carrier's determination, FCP will direct the employee to continue logging in and reporting all hours and related work activities in which the employee did not receive 8 hours of sleep (including 5 hours of uninterrupted sleep/rest) and three hours of duty free meal breaks.

Note: The Director of Patient Services or the Field Operations Manager is the point person responsible for coordinating access to higher level of care.

If the assigned live-in client does not interrupt employee's rest/sleep time, the employee must still call in and out on a daily basis during each assigned shift to record task 900 codes. When leaving the client's house at the end of shift, employee must also call out and record all the tasks completed during the entire duration of the shift.



PAYROLL CHECKS

All payroll payments are released every two weeks. All payroll payment itemizes deductions made from employee's gross earnings. By law, the agency is required to make deductions for Social Security, federal income tax and any other appropriate taxes, including Paid Family Leave (PFL) deduction. These required deductions may also include any court-ordered garnishments.

Paycheck will be given to employee only in person or mailed out to employee's home address. Employee may designate another person in writing and with appropriate identification to accept employee's check for employee. To expedite the cashing of employee's paycheck, the agency offers the option

of having pay be directly deposited into employee's bank account after employee provide us with the required authorization. When employee selects direct deposit, employee will receive an itemized statement of wages and deductions on paydays instead of a paycheck.

If employee believes there is an error in their pay, bring the matter to the attention of the bookkeeping department immediately. If the matter continues to be problematic, employee must contact the Fiscal Unit/Bookkeeping Department.

Bookkeeping department can be reached at extension 315, and is available for call on Thursday and Friday only.

THE FOLLOWING ARE PAID HOLIDAYS
(To be paid at double the rate of base wage)

- MARTIN LUTHER KING DAY
- PRESIDENT'S DAY
- MEMORIAL DAY
- INDEPENDENCE DAY
- LABOR DAY
- THANKSGIVING
- CHRISTMAS
- NEW YEAR'S DAY

^ Y R W

Employees are expected to work all holidays unless employees have been granted a written approval to take time off on these days. Employees who do not work on a holiday will not be paid holiday pay.

EMERGENCY DISASTER PLAN

It is the policy of the agency to have a written emergency plan that is current. It includes procedures for all agency employees to implement and follow to prevent disruption in care and services to clients in the event of an emergency.

All employees are required to have their own emergency disaster plan, emergency "go bag" with necessary supplies (flashlight, battery, radio, nonperishable food, water, medication, copy of important documents, etc.), and designated evacuation location.

An emergency is defined as any occurrence that causes local or widespread destruction resulting to interruption of basic services, vital to the agency's ability to function, e.g. loss of telephone and electrical services. The Agency promptly activates its emergency procedures when these types of situations take place. Below is a list of emergency situations which require employees to adopt measures to ensure the continuum of care until normal conditions resume:

Exhibit 27

**New York City Council Hearing
Testimony**

September 6, 2022

**Testimony to the New York City Council
Committee on Civil Service and Labor**

Submitted by:

Bryan O'Malley

Executive Director

Consumer Directed Personal Assistance Association of New York State
(CDPAANYS)

Good afternoon to the members of the committee. My name is Bryan O'Malley. I am Executive Director for the Consumer Directed Personal Assistance Association of New York State, or CDPAANYS, an organization that works to provide education and advocacy on the New York State Medicaid program's consumer directed personal assistance program (CDPA). I appreciate the opportunity to talk to you today about why, despite our long support for community-based long-term care and home care workers rights, we strongly oppose Intro 175.

Many who are directly impacted by this bill have spoken about what it would mean to them. Because of that, I want to address more completely the factual errors that have been made by proponents of this legislation.

The sponsor and advocates state that home care agencies are intentionally assessing people at live-in in order to exploit their workers and maximize their profits. Further, they have said that this is only happening in New York City, and that in other areas of the state, live-in does not exist and everyone gets continuous care, or split-shift.

The facts could not be more at odds with this rhetoric. And the facts are spelled out in State and Federal law and regulations.

Further, when we look specifically at CDPA, state regulations and guidance do even more to block the type of action that Intro 175 would seek to require of agencies.

State and Federal regulations and law dictate eligibility for services and assessment levels

New York State Department of Health (NYSDOH) regulations at 18 NYCRR 505.14 (personal care) and 18 NYCRR 505.28 (CDPA) define "continuous personal care services", "continuous consumer directed personal assistance", "live-in 24-hour personal care services", and "live-in 24-hour consumer directed personal assistance."

A Medicaid recipient qualifies for continuous personal care or CDPA if he or she is in need of "...assistance...with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks, and needs assistance with such frequency that a live-in 24-hour consumer directed personal assistant would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep."¹

They qualify for live-in 24-hour personal care or CDPA if they need "assistance...with toileting, walking, transferring, turning and positioning, feeding, home health aide services, or skilled nursing tasks and whose need for assistance is sufficiently infrequent that a live-in 24-hour consumer directed personal assistant would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep."²

¹ 18 NYCRR 505.14(a)(2) and 18 NYCRR 505.28(b)(6)

² 18 NYCRR 505.14(a)(4) and 18 NYCRR 505.28(b)(11)

These definitions do not apply only to New York City. There are not different definitions for Nassau or Westchester or Albany. There cannot be. 42 U.S.C. 1396a Section 1902(a) is clear on this when it says a state's Medicaid state plan must, "provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them."

Assessments are conducted by HRA, managed care plans, or Maximus - not agencies

To the claim that agencies are intentionally assessing people at lower levels in order to exploit workers and maximize profits, this too is wrong on the facts. Like the definition of continuous and live-in 24-hour services, the assessment process is laid out in intricate detail in regulations at 18 NYCRR 505.14 and 18 NYCRR 505.28.

This assessment process is extraordinarily thorough. It begins with an independent medical assessment of the individual by a health care professional provided by Maximus, the NYSDOH contractor, who determines if the individual can benefit from personal care services (including CDPA, if applicable)³. Once that determination is made, a nurse from Maximus is sent to the consumer's home to conduct a detailed assessment on a form called the Uniform Assessment System, or UAS.⁴ If conducted properly, the UAS takes anywhere between one and a half to three hours to complete, particularly on an initial visit.

The medical assessment used to be conducted by the Medicaid recipient's health care provider, and the assessment by the local district, in this case HRA, or the managed care plan. However, as of May 2022, the initial medical assessment and UAS assessment are conducted by the NYSDOH contractor Maximus.

Reassessments are conducted annually to ensure services are still appropriate. At this time, these assessments are conducted by the individual's medical professional and either HRA (in New York City) or the managed care plan.⁵ At some point in the future, Maximus will also take on the task of doing reassessments but this has not yet occurred.

The UAS measures the Medicaid recipient's need for services based on their requirement for Activities of Daily Living (ADLs), Instrumental Activities of Daily Living (IADLs), and the environment in which the consumer lives, such as whether they are in a garden apartment or a 5th floor walk-up).⁶

For the purposes of a decision between 24-hour live-in services, the UAS will also determine whether or not the Medicaid recipient has a space in the home where the worker would be able to have a place to sleep that is private and can serve as a bedroom. In other words, a Medicaid

³ 18 NYCRR 505.14(b)(2)(ii) and 18 NYCRR 505.28(d)(2)

⁴ 18 NYCRR 505.14(b)(2)(i) and 18 NYCRR (505.28(d)(1)

⁵ 18 NYCRR 505.14(b)(3)(i) and 18 NYCRR 505.28(f)(1)

⁶ 18 NYCRR 505.14(b)(2)(i)(b) and 18 NYCRR 505.28(d)(1)(ii)

recipient in a studio apartment cannot qualify for 24-hour live-in services because there is not an adequate space for the worker to sleep.⁷

Once the UAS assessment has been completed, it is passed to HRA or the managed care plan. HRA or the managed care plan uses the information from the assessment to determine the plan of care.⁸ The plan of care is the list of services that workers will be providing for the consumer and can range from basics such as meal preparation and getting dressed to complex tasks such as ventilator care, suctioning, medication administration, and more. The tasks on the plan of care ultimately determine the number of hours that a consumer receives, including whether or not those hours should be 24-hour live-in or continuous care.

It is only once HRA or the managed care plan has developed the plan of care and issued an authorization for the number of hours that the agency, either the licensed home care service agency (LHCSA) in personal care or the fiscal intermediary (FI) in CDPA receive a copy from HRA or the managed care plan. In the case of a LHCSA, once they have received the plan of care and the number of hours authorized, they develop a plan to staff the case. For CDPA, the FI merely keeps the authorized hours on file in order to know how many hours they are allowed to bill either Medicaid or the managed care plan on behalf of the consumer.

This is because in the case of CDPA, the Medicaid recipient, now called a consumer, is the one who recruits, hires, trains, schedules, supervises, and, if necessary, terminates his or her workers.⁹ By regulation, FIs are not responsible for carrying out the responsibilities of the consumer.¹⁰ In recent years, the NYSDOH went one step further to indicate that this means FIs are not allowed in any way to interfere with the consumer's role in recruiting, hiring, training, scheduling, supervising, or terminating his or her workers.¹¹ In 2020, the NYSDOH interpreted this to mean that FIs could not in any way control consumer scheduling, including the scheduling of overtime.¹²

Stating facts as to who controls the assessment process does not pretend that the assessment process works well. CDPAANYS has worked with many in this room since before the implementation of managed long term care to improve that assessment process for consumers.

Because of a lack of accountability from the state, many consumers who deserve continuous care are not assessed at the proper level and do not receive it. A 2016 report by Medicaid Matters New York and the National Academy of Elder Law Attorneys - New York Chapter, found

⁷ 18 NYCRR 505.14(b)(2)(iii)(c) and 18 NYCRR 505.28(d)(3)(iii)

⁸ 18 NYCRR 505.14(b)(2)(iii)(e) and 18 NYCRR 505.28(d)(3)(v)

⁹ 18 NYCRR 505.28(h)(1)(i)

¹⁰ 18 NYCRR 505.28(i)(2)

¹¹ NYS Social Services Law §365-f(4-a)(a)(iii)

¹² New York State Department of Health. "RFO #20039 Questions and Answers." Page 16. January 31, 2020. https://www.health.ny.gov/funding/rfo/20039/docs/questions_and_answers.pdf. Accessed on: August 31, 2022. Refer to section on Joint Employment, Question 5.

that managed care plans were systematically issuing unjustified reductions in consumer hours, reductions that were overturned on fair hearing over 98% of the time.¹³

Specifically, of the 22 cases in the cohort receiving continuous care, 12 would have been lowered to 24-hour live-in and the remaining 10 would have been lowered even more dramatically. In fact, the study determined that plans would have reduced hours by over 19,000 had fair hearings not intervened to stop them.

Unfortunately, the administration of former-Governor Cuomo responded to this by making it more difficult for Medicaid recipients to receive home care or CDPA in the first place, and more difficult for them to fight inadequate assessments or reductions by managed care plans after the fact - not by introducing greater accountability for managed long term care plans, who continue to reap enormous profits from the New York State Medicaid program.

Medicaid laws are not subject to New York City laws

It has been clearly established that the provision of personal care and CDPA are heavily governed by Federal law, State law, and NYSDOH regulations. Because of this, and the way in which these rules interact with each other, New York City does not have the authority to prevent someone from being authorized for 24-hour live-in services. It also places FIs in an untenable legal position by fining them if a consumer schedules their worker for a 24-hour live-in shift or for over 50 hours in a week.

Regardless of whether New York City enacts Intro 175 into law, the New York Independent Assessor will continue to authorize people for 24-hour live-in services. They are required to under state law and under the contract with the state. If someone meets the qualifications for 24-hour live-in services and does not receive them, they can appeal under their fair hearing rights. An administrative law judge (ALJ) looking objectively at the case using only Medicaid eligibility guidelines will make a determination about services and authorize 24-hour live-in.

When providers receive an authorization for 24-hour live-in services, they will have to make a decision. The authorization that comes in will be for 24-hour live-in services. There is an authorization and billing code specifically for this service.¹⁴ A provider may not bill for the service using a different authorization code. So, if the provider does not provide the live-in service, they cannot bill. If they send the worker to the home for 12 hours, and bill using the 24-hour live-in billing code, they commit Medicaid fraud. If they provide the 24-hour live-in service, they are in violation of the City law and must pay a \$500 fine.

¹³ Bogart, Valerie, et al. "Mis-managed care: Fair Hearing Decisions on Medicaid Home Care Reductions by Managed Long Term Care Plans, June-December 2015". July, 2016. Medicaid Matters New York and National Association of Elder Law Attorneys: New York Chapter.

<https://medicaidmattersny.org/mltc-report/> Accessed on: August 31, 2022.

¹⁴ Ulberg, John. "DAL - Universal billing codes for Home and Community LTC." New York State Department of Health, 12/21/2016.

https://www.health.ny.gov/facilities/long_term_care/reimbursement/letters/dal_2016-12-21_billing_codes.htm Accessed on 8/31/2022.

In reality, the provider will not take the case. The disabled or older individual will go without services. This is not the outcome anyone wants.

In CDPA, the case is even more complicated. Again, the FI receives the authorization with a universal billing code for 24-hour live-in services. The consumer is told of this authorization as well and will schedule their worker, who they hire and supervise, to fill that need. The FI will face a fine from New York City for the consumer's scheduling decision. The \$500 fine is approximately \$125 - \$ 250 more than the reimbursement that the FI receives.¹⁵ That means if a mid-sized agency has 100 consumers who receive live-in services, they would face approximate daily losses of \$2,000. Annual losses for such an agency would be almost \$750,000.

Changes to state law will not inherently follow

Some advocates, and even the sponsor, have indicated they are aware of the discrepancy with state law, but that Intro 175 will force NYSDOH, the Governor, and the Legislature to act and change state law. Unfortunately, history does not bear this out.

When New York City, as well as Nassau, Suffolk, and Westchester counties, introduced local living wage laws to ensure workers received higher wages, legislation was introduced in Albany to ensure that these funds were made available in the Medicaid rates.¹⁶ While the bill was introduced and fought for every year for eight years, it never gained traction because the NYSDOH and the Division of the Budget consistently maintained the laws were local laws, not state laws, and therefore the state had no obligation to fund them.

There is nothing in the record to support a claim that their position would be different here.

A ban on overtime is unprecedented and will harm workers

The losses above do not even factor in the provision of overtime. The provision in Intro 175 that bans home care workers from working overtime in excess of ten hours per week is an unprecedented action infringing on an individual's ability to decide how many hours they want to work. What is worse is that, because of the low wages dictated by Medicaid's wholly inadequate reimbursement, many workers rely on these overtime hours to survive. If they are banned from working these hours they will either be forced to work cumulatively more hours across multiple agencies, or they will leave this already depleted workforce to earn more in private companies like Chipotle, Target, or Amazon.

¹⁵ Bureau of Long Term Care Reimbursement. "Consumer Directed Personal Care Agencies: April 1, 2022 Rates." https://www.health.ny.gov/facilities/long_term_care/reimbursement/cdpap/cdpap_personal_care_rates_2022-04.htm Accessed on August 31, 2022.

¹⁶ A.8695 (Paulin)/S5583 (Spano) of 2005-06; A.1223 (Paulin)/S.3760 (Trunzo) of 2007-08; A.756 (Paulin)/S4986 (Foley) of 2009-10; A.80 (Paulin)/S.3001 (Perkins) of 2011-12. "An act to amend the social services law and chapter 1 of the laws of 2002, amending the public health law, the social services law and the tax law relating to the Health Care Reform Act of 2000, in relation to the living wage adjustment of personal care services workers."

While laws against mandatory overtime are common, we do not know of laws against overtime at this level. CDPAANYS believes firmly that nobody should be forced to work overtime; however, to remove someone's ability to do so is the removal of their choice. This has particular implications here.

Last year, New York City spent \$762 million on overtime for the New York City Police Department, the second highest police overtime on record.¹⁷ 19% of whom are women.¹⁸ Overall, across all uniformed agencies (police, correction, fire, sanitation), overtime spending was \$1.8 billion, the highest on record.¹⁹ Overall spending on overtime for all of New York City, including non-uniformed agencies, was \$2.2 billion.²⁰

While spending record amounts on overtime for city workers, Intro 175 would have New York City limit the amount of money an individual in the private workforce can work. A workforce that is 92% women²¹.

Not only is this ban on overtime unprecedented and contrary to the City's own policies in relation to its own workforce, it will not even serve the purpose it is intended to serve. Presumably, this provision is meant for aides to work fewer hours. But of the two outcomes the provision will have, fewer hours is neither reality.

The first outcome will be that home care aides work more, not less. A PA working 60 hours for a consumer today at \$15/hour earns \$1,050/week. If forced to work only 50 hours, that pay will decrease to \$825/week, with no corresponding reduction in the cost of living. To make up that pay gap, the PA will be forced to find another consumer with another agency and take a second (or third) job working for them. To earn the \$225 difference, the PA will have to work 15 hours at the new agency, five more than they would have had to work otherwise.

Of course, this is not the only, or even most likely, outcome. In recent years the home care industry has seen people leaving in droves due to higher wages in fast food, retail, and other low wage, private sector employment opportunities. In a 2021 report by CDPAANYS, we found that statewide 52% of PAs quit to go another job with higher wages, and 6% quit due to insufficient hours. In New York City specifically, the higher minimum wage of \$15 meant that

¹⁷ McDonough, Annie. "NYPD, other uniformed agency overtime spending is on the rise." *City & State*. August 17, 2022.

<https://www.cityandstateny.com/policy/2022/08/nypd-other-uniformed-agency-overtime-spending-rise/375996/> Accessed on: August 31, 2022.

¹⁸ Police Department, City of New York. "Percent of Gender by Rank/Title." Data refreshed on 7/11/2022. <https://app.powerbigov.us/view?r=eyJrIjojZTI4OTRjZTYtNTYwOC00NzcxLTlhYTItOTU5NGNkMzIzYjVlIiwidCI6IjJiOWY1N2ViLTc4ZDEtNDZmYi1iZTgzLWEyYWZkZDdjNjA0MyJ9&pageName=ReportSection>. Accessed on: August 31, 2022.

¹⁹ Ibid.

²⁰ Ibid.

²¹ PHI Workforce Data Center. "Direct Care Workers by Gender, 2019." <https://www.phinational.org/policy-research/workforce-data-center/#var=Gender&states=36> Accessed on: August 22, 2022.

fewer people, or 28%, quit because of the low wages. However, the number that quit due to insufficient hours doubled and was at 12%.²²

If over one-third of those in the workforce were leaving the industry previously because of low wages or insufficient hours, a ban on further hours and hence higher wages can only drive that number up. It will offset the potential impact of the \$2/hour wage increase taking effect on October 1, and cause even greater disruption within a sector already experiencing a worst in the nation workforce crisis.

Conclusion

CDPAANYS is committed to ensuring that home care work is valued. For years we have worked on legislation at the state level that builds community-based long-term care. We have worked with partners such as 1199, the Legal Aid Society, Medicaid Matters New York, JFREJ, and Caring Across Generations. Most recently, we have played a leadership role in the fight for Fair Pay for Home Care, demanding that wages equal at least 150% of the minimum wage - a standard that was picked due to the fact that New York City's living wage, before the state minimum wage increased in 2011, was approximately 150% of the minimum wage and afforded home care workers the ability to earn a higher wage.

Last year we achieved significant victories, securing a \$3/hr. wage increase over two years and indexing a home care minimum wage to the minimum wage. We remain steadfast in our fight for Fair Pay for Home Care and ensuring wages for PAs, PCAs, and other home care staff can earn a fair living without having to work overtime unless they want to.

We are also committed to working with Assemblymember Harvey Epstein, Senator Roxanne Persaud, Senator Gustavo Rivera, and the next chair of the Assembly Health Committee to ensure that the state legislation eliminating live-in services and reforming the assessment process is enacted at the state level - where we can do it properly.

As we continue to fight for broad investment in home care, honoring of the Americans with Disabilities Act and the late Justice Ginsberg's decision in *Olmstead v L.C. (by Zimring)*, we hope the New York City Council will join us and fight alongside us for these, and other, critical investments. Together we will create a better New York for home care workers and those who rely on them. But today, this legislation is not the answer.

Thank you and I am happy to take any questions.

²² Battista, Julia. "The High Cost of Low Wages: A home care system in crisis." October, 2021. <https://cdpaanys.org/wp-content/uploads/2021/11/Final-High-Cost-of-Low-Wages-Report.pdf>. Accessed on: August 31, 2022.



DISABLED IN ACTION OF METROPOLITAN NEW YORK
POST OFFICE BOX 1550
NEW YORK, NY 10159 TEL 646-504-4342
www.disabledinaction.org

Testimony Against Intro 0175 to the City Council – September 6, 2022

I am president of DIA, Disabled In Action of Metropolitan NY. Some of us have homecare so that we can live independently in our homes and not nursing homes. We contribute to society with the help of our homecare.

We are against Intro 0175 because it has the ability to destroy homecare and our lives with it. We are concerned about the effects of Intro 0175 and do not support it. It could create new problems. At some point in their lives, most people will need homecare. A just society takes care of everyone, not just some. We do not believe that overtime should be forced upon workers except in emergencies, but the essential issue is that the State of New York does not want to pay workers for all of their work.

We are concerned that people with disabilities who have homecare (which includes aides who help people outside of their homes) will be left alone and be unable to care completely for themselves. That would be dangerous.

When my husband became seriously disabled and ill, he could not get the care he needed. He needed 24 hours and the state offered live-in care, but I knew that the aides would not get enough sleep, nor would they be able to care for him adequately at night because he needed a lot of care at night. It was a huge dilemma.

Some aides like to work live-in jobs. Some want more overtime but the agencies stopped paying most overtime once the hourly rate increased by \$1 and overtime in unionized agencies had to be paid extra. What the aides have to do is work for several agencies and work even more hours. Some aides have tried working 12 hours on one job and 12 hours on the next one. Yes, 24 hours a day but they are getting paid for each hour. They need the money. Some aides are homeless and want to do a live-in. Some aides want to work longer each day and have more days off. They work it out with their CDPA employer.

It is almost impossible to get a fill-in aide when no one shows up, but people cannot safely be left alone.

This bill does not solve the problems that it purports to solve. It will create more problems. Who will be fined? The person who is disabled who is hiring the aides?

You can't try to force change from the State of NY by passing a NYC law. It will lead to chaos. The situation needs to be fair and it needs to be flexible while people get the care they need and homecare workers work the hours they want to and get paid for the hours they work.

Jean Ryan
Pansies007@gmail.com

Hello my name is José Hernandez. I would like to first thank the City Council for allowing me to share my story on why Intro 175 scares me.

I experienced a spinal cord injury back in 1995 when I was just 15 years old. Initially when I was released from the hospital I was authorized for a 2 - 12 hour split shift. A year after being home a worker from HRA came into my home and gave me an ultimatum - sign paperwork to convert my case to a 24 hour live-in case or go into a nursing home. As a scared teenager, I signed the form and had a live-in case for the next 16 years.

In 2008 I met one of the most impactful home care workers to ever have entered my life. When Fausto started working with me, he started as a 24 hour live-in worker. In fact, I am here right now because of the role he played in my life.

You will be hard pressed to find people more committed to the intentions of this bill than people with disabilities. We know our freedom is tied directly to our workers. But, while I, and most people with disabilities, believe in the intentions behind Intro 175 it returns me to the trauma caused by that HRA caseworker 26 years ago. People with disabilities have struggled for many years to justify their existence in society and their desire to live in the community.

People with disabilities and older adults who have been authorized 24-hour live-in services are going to go without much needed care or be placed into a nursing home because of intro 175. The law would force the abandonment of people with disabilities and older adults, who will have no choice but to be placed into a nursing home.

Some argue this is not the bill's intent. Intent doesn't determine outcome. Intro 175 will not change State Medicaid rules. People with disabilities and seniors will still be authorized for 24 live-in services, in some cases by HRA. Intro 175 cannot make their 24-hour live-in cases split cases; and people will go without needed services.

If we are serious about protecting home care workers, people with disabilities, and older adults, we must work together to advocate with Assemblymember Epstein and Senator Persaud to do this the right way in Albany.

In 1972, Geraldo Rivera disclosed the horrors of Willowbrook Institution right here in New York City, igniting the disability rights movement for deinstitutionalization.

In 1990 people with disabilities crawled up the steps of the Capitol, finally earning a law that recognized their basic civil rights.

In 1999 Justice Ruth Bader Ginsburg used the ADA to author *Olmstead v L.C.*, recognizing that people with disabilities have a right to receive services in the least restrictive environment possible.

The Supreme Court is doing enough to undo 50 years of progress on civil rights. We do not need the New York City Council to help them.

Exhibit 28

**Affidavit of Xiao Wen ZHEN in *Matter of
Chinese Staff and Workers Association v.
Reardon***

May 2, 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

CHINESE STAFF AND WORKERS
ASSOCIATION, NATIONAL
MOBILIZATION AGAINST
SWEATSHOPS, IGNACIA REYES, et. al.

Petitioners-Plaintiffs,

For Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules, Declaratory
Judgment

- against -

ROBERTA REARDON, in her capacity as
the Commissioner of the New York State
Department of Labor, and the NEW YORK
STATE DEPARTMENT OF LABOR,

Respondents-Defendants

**AFFIDAVIT OF XIAO WEN
ZHEN**

Index No. _____

STATE OF NEW YORK:

COUNTY OF NEW YORK:

XIAO WEN ZHEN, being duly sworn, deposes and says:

1. I am a named Petitioner-Plaintiff in this action.
2. I reside in Richmond County.
3. I have been employed as a home attendant for 13 years. I have cared for the same client for all 13 years.

4. I have worked 24 hour shifts since 2006. When I started working as a home attendant, I worked six hour shifts. I started working 24 hour shifts when my client's condition worsened.

5. I have worked for the Chinese American Planning Council Home Attendant Program, Inc. ("CPC") the entire time I have been a home attendant.

6. I work four 24 hour shifts one week, and three 24 hour shifts the next.

7. I am only paid for 13 hours of work for each 24 hour shift. If I get up during the night to help my client, I have to write a report that the client signs. Sometimes, CPC pays me for part of the time that I am up helping the client.

8. My client requires help with many tasks, including using the bathroom. Her medication makes her go to the bathroom frequently, so I have to help her multiple times a night.

9. My client's nurse has told my client that they can only get up with my assistance twice during the night, and that there is not enough money to pay me to help the client more than twice each night.

10. I am never able to sleep through the night while at work, and I rarely get more than a few hours of sleep.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May __, 2018
New York, NY

Xiao Wen Zhen
XIAO WEN ZHEN

Sworn to before me this
21st day of May 2018

Michelle Yvette Peoples
Notary Public

MICHELLE YVETTE PEEPLES
NOTARY PUBLIC-STATE OF NEW YORK
No. 01PE6342211
Qualified In Queens County
My Commission Expires 05-23-2020

AFFIDAVIT OF TRANSLATION

STATE OF NEW YORK:

COUNTY OF NEW YORK:

Zishun Ning, under penalty of perjury, declares:

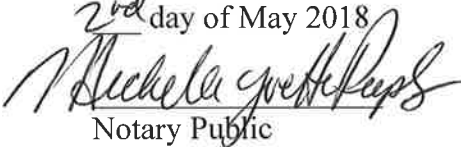
Pursuant to CPLR § 2101, I, Zishun Ning, hereby declare that I speak Cantonese and English fluently. I translated the foregoing statement, Affidavit of Xiao Wen Zhen, and read it back to Xiao Wen Zhen in its entirety in Cantonese on May 2, 2018.

Dated: May 2, 2018
New York, NY



Zishun Ning

Sworn to before me this
2nd day of May 2018



Notary Public

MICHELLE YVETTE PEEPLES
NOTARY PUBLIC-STATE OF NEW YORK
No. 01PE6342211
Qualified In Queens County
My Commission Expires 05-23-2020