

## **Testimony of Caitlin Connolly**

National Employment Law Project

# **Implementation of the U.S. DOL Home Care Final Rules**

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## **Hearing before the New Mexico Legislative Health and Human Services Committee**

San Juan College, Farmington, New Mexico

September 20, 2016

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Thank you for the opportunity to speak this morning. The National Employment Law Project (NELP) is a non-profit, non-partisan research and advocacy organization specializing in employment policy. We partner with federal, state and local lawmakers and local stakeholder groups on a wide range of workforce issues. Across the country, our staff is recognized as policy experts in areas such as unemployment insurance, wage and hour enforcement, minimum wage, and workplace protections for low-wage workers. NELP's work has long included a special focus on improving conditions for home care and domestic workers at the federal, state and local level. As part of that work, NELP researches and documents the workplace conditions of home care workers, and supports good implementation of state and federal laws that protect these workers.

Making home care jobs quality jobs is not only the right thing to do for workers; it is imperative if we are to meet the demands of an aging America. Nearly 90 percent of older adults want to stay in their home as they age.<sup>1</sup> In addition to being the consumer preference, remaining at home is most often less costly than alternatives such as institutional care. But with 10,000 Americans turning 65 every day, there is only one paid workforce that will allow for aging in place to become a reality: home care workers.<sup>2</sup> We must ensure that home care workers, who provide an estimated 70 to 80 percent of paid, hands-on care, are supported in their critical role.<sup>3</sup>

Family caregivers and home care workers (often referred to as personal care attendants and home health aides) are the backbone of in-home long-term services and supports. Like home care workers, family caregivers provide critical assistance with activities such as bathing, dressing, and shopping, and almost half perform medical or nursing tasks.<sup>4</sup> The ratio of family caregivers to older adults, however, is on a sharp decline. In 2010, the ratio was more than seven potential caregivers to every one person in the high-risk years of 80-plus. In 15 years, that ratio will be four to one, and by 2050, it is expected to be only three to one.<sup>5</sup> To fill this tremendous gap, we must significantly strengthen the home care workforce.

As you know, the federal protections of the Fair Labor Standards Act (FLSA) were extended to home care workers in 2015. The U.S. Department of Labor Home Care Final Rules

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<sup>1</sup> AARP Public Policy Institute and National Conference of State Legislatures, In Brief, Aging in Place: A State Survey of Livability Policies and Practices. 2011 December. [assets.aarp.org/rgcenter/ppi/liv-com/ib190.pdf](http://assets.aarp.org/rgcenter/ppi/liv-com/ib190.pdf)

<sup>2</sup> Pew Research Center, Baby Boomers Retire. 2010 December. [www.pewresearch.org/daily-number/baby-boomers-retire/](http://www.pewresearch.org/daily-number/baby-boomers-retire/)

<sup>3</sup> PHI, Facts 3: America's Direct-Care Workforce. 2013 November. [phinational.org/sites/phinational.org/files/phi-facts-3.pdf](http://phinational.org/sites/phinational.org/files/phi-facts-3.pdf)

<sup>4</sup> AARP Public Policy Institute. Home Alone: Family Caregivers Providing Complex Chronic Care. 2012 October. [www.aarp.org/home-family/caregiving/info-10-2012/home-alone-family-caregivers-providing-complex-chronic-care.html](http://www.aarp.org/home-family/caregiving/info-10-2012/home-alone-family-caregivers-providing-complex-chronic-care.html)

<sup>5</sup> AARP Public Policy Institute, The Aging of the Baby Boom and the Growing Care Gap. 2013 August. [www.aarp.org/home-family/caregiving/info-08-2013/the-aging-of-the-baby-boom-and-the-growing-care-gap-AARP-ppi-ltc.html](http://www.aarp.org/home-family/caregiving/info-08-2013/the-aging-of-the-baby-boom-and-the-growing-care-gap-AARP-ppi-ltc.html)

contain two major changes: they clarify and narrow what constitutes FLSA-exempt “companionship services” and they exclude third-party employers, such as home care agencies, states, and other public entities that solely or jointly employ home care workers, from claiming either the exemption from minimum wage and overtime that applies to the narrowly defined occupation of “companions” or the overtime exemption that applies to live-in domestic workers. Under FLSA, workers must be paid for all hours worked, including for travel time within the work day. Additionally, it is the responsibility of the employer to keep an accurate record of all hours worked.

We have seen many states and employers take critical steps towards good implementation of the home care rules. The best of these examples have created reasonable worker hours caps, robust exceptions policies to those caps, and have invested in making these good, quality jobs that attract and retain the workers needed to meet the growing home care demand.

Across the country, states are engaging in [good implementation](#) practices that help to strengthen the workforce and ensure compliance with the law:

- California budgeted to pay its estimated 376,000 workers in its In-Home Supportive Services (IHSS) for weekly overtime and travel time. The state created reasonable policies: a worker hours cap of 66 to 70 hours per week, pay for travel time, and an exceptions policy for those individuals whose health or safety would be at risk because of the hours cap.<sup>6</sup>
- Nebraska’s Division of Medicaid and Long-Term Care began paying for overtime and travel time in October 2015.<sup>7</sup>
- New York, retroactive to October 13, 2015, increased its reimbursement rate by \$0.34 per hour. New York worked in collaboration with SEIU 1199 United Health Care Workers East and worker advocacy organizations to calculate the adjustment. The state has requested a funding increase from the Centers for Medicare & Medicaid Services (CMS), as all states may do.
- Oregon budgeted funding to implement the home care rules, after creating a worker hours cap of 50 per week, per consumer, with a very strong exceptions process and

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<sup>6</sup> California DSS *Letter to all county IHSS program managers*, January 7, 2016. [www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-01.pdf](http://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-01.pdf)Disability; and Disability Rights California posting of the *IHSS: Overtime & Related Changes*, January 25, 2016. [www.disabilityrightscalifornia.org/Events/2015IHSSOvertimeInformation.htm](http://www.disabilityrightscalifornia.org/Events/2015IHSSOvertimeInformation.htm)

<sup>7</sup> Nebraska Division of Medicaid and Long-Term Care memo re: Overtime and Travel Time, December, 29, 2015. <http://dhhs.ne.gov/Documents/Memo-to-Providers-12-29-15.pdf>

policy.<sup>8</sup> Additionally, a contract between the state and SEIU Local 503 outlines a pathway of up to \$15 an hour by 2017.<sup>9</sup>

- Pennsylvania is paying overtime to home care workers in the consumer-directed program.<sup>10</sup>
- Washington budgeted for compliance with the rule's overtime and travel time requirements, and created a 65 hours per week worker cap, which is enacted when the state does an annual review of a consumer's plan of care.<sup>11</sup> The state created an exceptions policy and process.<sup>12</sup>

In states that budgeted adequate Medicaid funding for implementation, the Centers for Medicare and Medicaid Services has amended reimbursement options to pay for overtime and travel time for Medicaid-funded home care programs. With the Federal Medical Assistance Percentage (FMAP) of at least 50 percent, at least double the funding goes back into state and local economies. The Fiscal Year 2017 FMAP rate for New Mexico is 71.13 percent.<sup>13</sup>

Even when a state decides to impose reasonable weekly hours caps to defray overtime costs, there must be a policy that allows for exceptions to those caps if they pose a risk to someone remaining in their home. The US Department of Justice and the U.S. Health and Human Services' Office of Civil Rights have urged states implementing caps on home care worker hours to develop an exceptions policy for individuals who might be placed at serious risk of institutionalization as a result of any proposed worker hours caps.<sup>14</sup> Their 2014 letter reminds states that under the Americans with Disabilities Act (ADA), as interpreted by the Supreme Court's *Olmstead v. L.C.* decision, public entities must ensure that all individuals with disabilities can receive services in the most integrated setting appropriate to their needs. Under federal law, a state will violate the ADA and *Olmstead* if its overtime caps lead to cuts in services that force individuals with disabilities into institutions or cause a decline in their health and safety that places them at serious risk of institutionalization.

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<sup>8</sup> Oregon memo, *Exceptions to Individual Support Plan Hourly Cap for PSWs*, July 20, 2015. [www.dhs.state.or.us/spd/tools/dd/cm/PSW%20Hours%20Limits%20Exceptions%20Worker%20Guide.pdf](http://www.dhs.state.or.us/spd/tools/dd/cm/PSW%20Hours%20Limits%20Exceptions%20Worker%20Guide.pdf)

<sup>9</sup> SEIU Local 503 Homecare page, retrieved June 2016. [www.seiu503.org/category/worksites/care-providers/homecare/](http://www.seiu503.org/category/worksites/care-providers/homecare/)

<sup>10</sup> Pennsylvania Department of Human Services, *Notice 46 Pa.B.106*, January 2, 2016. [www.pabulletin.com/secure/data/vol46/46-1/23.html](http://www.pabulletin.com/secure/data/vol46/46-1/23.html)

<sup>11</sup> Washington 2015-2017 Omnibus Operating Budget – 2016 Supplemental, page 119, March 28, 2016. [http://leap.leg.wa.gov/leap/Budget/Detail/2016/SOAgencyDetail\\_0329.pdf](http://leap.leg.wa.gov/leap/Budget/Detail/2016/SOAgencyDetail_0329.pdf)

<sup>12</sup> State of Washington, *Engrossed Second Substitute House Bill 1725*, Passed by the House and Senate on March 29, 2016. <http://lawfilesex.leg.wa.gov/biennium/2015-16/Pdf/Bills/House%20Passed%20Legislature/1725-S2.PL.pdf>

<sup>13</sup> Kaiser Family Foundation, FY2017 FMAP for Medicaid and Multiplier chart. <http://kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier/>

<sup>14</sup> See Dear Colleague letter: [http://www.ada.gov/olmstead/documents/doj\\_hhs\\_letter.pdf](http://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf)

Alternatives to weekly hours caps are to hire additional workers to cover the long-hours needs of individuals, wherever possible. Overtime protections exist in our federal and state laws to promote this spreading of employment to those who want more hours (involuntary part-time work is a problem in this sector, with only 40 percent of workers working full time, year-round), and to avoid overworking individual workers.<sup>15</sup>

Furthermore, unreasonable cuts to worker hours can destabilize the workforce, reducing the potential for sustaining a long-term, professional workforce to meet current and future home care demands. More information on good exceptions policies and processes can be found in [\*Key Considerations for Developing and Exceptions Process for Overtime Caps\*](#).<sup>16</sup>

Making home care jobs quality jobs will be essential to meeting our current and future demand. In addition to good wages and benefits, these jobs should also provide good working conditions. For starters, all workers should be classified correctly. Home care workers should rarely be classified as independent contractors.<sup>17</sup> A recent US Department of Labor (US DOL) Administrator's Interpretation (AI) describing the breadth of coverage of the Fair Labor Standards Act (FLSA) to employees is an important reminder that most workers are covered by the FLSA, despite what their employers may label them.<sup>18</sup> Employers should also provide reliable, regular schedules so workers have dependable pay and work hours. Furthermore, to ensure that public dollars are spent on workers and services rather than overhead or profit, many states and cities have enacted wage pass-through requirements which designate a percentage of Medicaid funds that must go towards worker wages and direct worker costs.

Legislators play a major role in ensuring the rights of workers and consumers are upheld and that these rules are implemented well. At NELP, we urge a 4-point plan for successful and long-term implementation:

- Pass a Memorial which creates a task force to facilitate ongoing communication and coordination between state agencies and other stakeholders, including home care workers, live-in workers, consumers with disabilities, older adult consumers, and family caregivers.
- Comply with the new federal rules and budget adequate funding for implementation and enforcement.

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<sup>15</sup> PHI, *Paying the Price: How Poverty Wages Undermine Home Care in America*, February 2015.

<http://phinational.org/sites/phinational.org/files/research-report/paying-the-price.pdf>

<sup>16</sup> NELP, NDWA, et al, April 2016. <http://nelp.org/content/uploads/USDOL-Home-Care-Rules-Considerations-for-Developing-Exceptions-Process-Overtime-Caps.pdf>

<sup>17</sup> NELP, Independent Contractor Classification in Home Care, May 2016.

<http://www.nelp.org/content/uploads/Home-Care-Misclassification-Fact-Sheet.pdf>

<sup>18</sup> Weil, David. U.S. Department of Labor, Wage and Hour Division. Administrator's Interpretation No. 2015-1, July 15, 2015. [http://www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf)

- Join nearly half of the states in the U.S. and extend state minimum wage and overtime protections to home care and domestic workers.<sup>19</sup>
- Use NELP as a resource, in addition to the U.S. Department of Labor, which will gladly provide Technical Assistance.

The state should ensure that all home care programs are complying with the new rules. It is not only the law that home care workers must have these protections, it is good social and fiscal policy to make sure that these workers are valued for their incredible contributions of providing supports and services to New Mexican residents.

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<sup>19</sup> New Mexico minimum wage and overtime law exempts domestic service employees employed in a home. N.M. Stat. Ann. § 50-4-21(C)(1).