Senate Joint Memorial 6 Task Force

Phase 1 Report

Recommendations on
New Mexico Medicaid Programs
Related to
Fair Labor Standards Act
"Home Care Rule" of 2015

Presented to
New Mexico
Legislative Health and
Human Services (LHHS) Committee

Prepared by

NEW MEXICO
DIRECT CAREGIVERS
COALITION

October 2017

For more information:

New Mexico Direct Caregivers Coalition
Ph. 505-867-6046
www.nmdcc.org
facebook.com/NewMexicoDirectCaregiversCoalition
twitter.com/NMCaregivers

NMDCC advocates for direct care workers' education, training, benefits, wages and professional development so they may better serve people who are elderly and those with disabilities.

Table of Contents

Acknowledgements

This report to the New Mexico Legislative Health and Human Services (LHHS) Committee would not have been possible without the expertise of National Domestics Workers Alliance (NDWA) and Caring Across Generations' Elly Kugler, J.D. and Henry Claypool; Ellen Pinnes, J.D., Patty Emord, Ph.D; and LHHS Committee and state legislators who sponsored, supported and directed this study.

New Mexico Direct Caregivers Coalition also wishes to thank the many caregivers and care recipients in New Mexico and throughout the country who advocated for the changes recommended here.

Special thanks to Senate Joint Memorial 6 Task Force Members:

Melanie Buenviaje, *New Mexico Human Services Department, Medical Assistance Division*

Cabinet Secretary Celina Bussey, *New Mexico Workforce Solutions*

Jackie Cooper, AARP-NM

Jason Cornwell, *New Mexico Department of Health, Developmental Disabilities Supports Division*

Joie Glenn, RN MBA CAE, *New Mexico Association for Home and Hospice Care*

Jason Gordon, *Disability Rights New Mexico*

Dana Howarth, *Heart is Home Cooperative Care*

Doris Husted, *The ARC of New Mexico*

Rita Jojola, *Pueblo of Isleta Elder Center*

Elisa Kawam MSW, Ph.D., *National Association of Social Workers-New Mexico Chapter*

Jeremiah Kelly, MD., MMM, *Geriatrician*

Secretary Designate Kyky Knowles, *New Mexico Aging and Long-Term Services Department*

Karen Kopera-Frye, Ph.D., *New Mexico State University*

Jessica Lopez-Collins, *Forward Together*

NEW MEXICO DIRECT CAREGIVERS COALITION

Meggin Lorino, *New Mexico Association for Home Hospice Care*

Kalonji Mwanza, *Village Servant*

Alisha Norsworthy, *Caregiver*

Senator Jerry Ortiz y Pino, *New Mexico State Senate*

Branda Parker, *San Juan Center for Independence*

Andrea Plaza, *Encuentro*

Janet Popp, *Physical Therapist*

Manya Pungowiyi, *Caregiver*

June Rodriguez, *New Mexico Department of Health - Developmental Disabilities Supports Division*

Linda Sechovec, *New Mexico Health Care Association*

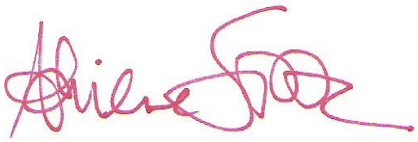
Adrienne R. Smith, *New Mexico Direct Caregivers Coalition*

Guy Surdi, *Governor's Commission on Disability*

Tallie Tolen, *New Mexico Human Services Department, Medical Assistance Division*

Karen Whitlock, *National Association of Social Workers-New Mexico Chapter*

Marcos Martinez, *New Mexico Department of Workforce Solutions*



Adrienne R. Smith
President and CEO
New Mexico Direct Caregivers Coalition

NEW MEXICO
DIRECT CAREGIVERS
COALITION

Executive Summary

In 2015, the U.S. Department of Labor (DOL), recognizing "the changes to the home care industry and workforce,"[1] revised FLSA regulations to extend minimum wage and overtime protections to the nearly 4 million homecare workers in the United States.

Known as the "Home Care Rule," these new rules extended to these important workers a floor of basic labor protections intended to improve working conditions, a step seen as benefiting workers and thus strengthening the direct care workforce.

Senate Joint Memorial (SJM) 6 of the 2017 New Mexico Legislature directed the creation of a statewide Task Force to recommend short-term and long-term actions to ensure that the state complies with federal law, implements policies that best meet the needs of individuals receiving long-term supports and services and promotes a stable and growing workforce to meet the needs of seniors and individuals with disabilities who rely on these services in order to live independently in their communities.

This is the first report of the SJM 6 Task Force. These recommendations to the LHHS Committee are focused on ensuring that the state's Medicaid home and community-based (HCBS) services comply with federal regulatory provisions of FLSA.

Background

The "direct care workforce" includes Nursing Assistants; Personal Care Aides; Home Health Aides and related direct care occupations.[2] Together, they comprise the fastest-growing profession in the State of New Mexico. This workforce--88% of whom are women and largely women of color--performs the invaluable, life-saving work of caring for those who are elderly and those with disabilities.

Nationally, more than 3.2 million direct care workers were employed by facilities and agencies in three occupations in 2012: Nursing Assistants (1,420,020); Home Health Aides (839,930); and Personal Care Aides (985,230). Another estimated 800,000 independent providers, not captured in these counts, were employed across the country

[1] Preamble to Final Rule, 78 Fed. Reg. 60454 (10/1/2013).

[2] These workers provide assistance to those who are elderly and those with disabilities. They help consumers/care recipients with the activities of daily living such as bathing, dressing and grooming; transport to/from doctor's offices; emotional support and other activities.

in public programs that provide personal care services. Independent providers are employed directly by consumers.[3]

In New Mexico, there are more than 61,000 of these workers, also known as "caregivers," and the demand for them will grow exponentially[4]: by 2030, NM will rank #4 in the nation in terms of percentage of population age 65 and older.[5]

In spite of present and future demand, the direct care workforce earns only $9-$12/hour on average, a wage that requires they work two (or three) jobs just to make ends meet. This condition also affects a provider's ability to retain good employees.

The federal Fair Labor Standards Act (FLSA) sets standards that require payment of at least the applicable minimum wage, overtime pay of at least time-and-a-half for more than 40 hours worked in a workweek and pay for time spent traveling between clients in the course of the caregiver's workday.[6] FLSA protections were extended to domestic service workers in 1974, but direct care workers providing what were deemed "companionship services" were excluded from the otherwise broad guarantees of minimum wages and overtime pay.

In 2015, the U.S. Department of Labor (DOL), recognized "the changes to the home care industry and workforce"[7] and revised FLSA regulations to extend minimum wage and overtime protections to the nearly 4 million homecare workers in the United States. Known as the "Home Care Rule," these new rules extended a floor of basic labor protections intended to improve working conditions to these workers, a step seen not only as benefiting workers, but as important for strengthening the direct care workforce.

As DOL stated in the Preamble to the Final Rule:

> "Studies have shown that the low income of direct care workers continues to impede efforts to improve both the circumstances of the workers and the quality of the

---

[3] PHINational, PHI Facts 3. November 2013 Update. See https://phinational.org/sites/default/files/phi-facts-3.pdf. Retrieved 10/16/2017.

[4] New Mexico Direct Caregivers Coalition http://nmdcc.org/what-we-do/what-is-home-care. Retrieved 10/16/2017.

[5] Con Alma Health Foundation, "Health Equity in New Mexico: A Roadmap for Grantmaking and Beyond: Key Findings and Recommendations." August, 2012. https://conalma.org/wp-content/uploads/2012/10/CAHF2012HER_KeyFind.pdf. Retrieved 10/16/2017.

[6] "Hours worked" generally includes all time when the employee is required to be on the employer's premises, on duty, or at a prescribed workplace. U.S. Department of Labor, Wage and Hour Division, at https://www.dol.gov/whd/flsa/.

[7] Preamble to Final Rule, 78 Fed. Reg. 60454 (10/1/2013).

services they provide. Covering direct care workers under the Act is, thus, an important step in ensuring that the home care industry attracts and retains qualified workers that the sector will need in the future" (78 Fed. Reg. at 60458).

"[T]he Department believes that ensuring minimum wage and overtime compensation will not only benefit direct care workers but also consumers because supporting and stabilizing the direct care workforce will result in better qualified employees, lower turnover, and a higher quality of care" (78 Fed. Reg. at 60459-60).

SJM 6 was passed by the New Mexico legislature during the 2017 legislative session.[8] The memorial created a task force to study direct care programs funded by Medicaid. The New Mexico legislative memorial directed New Mexico Direct Caregivers Coalition (NMDCC) to convene stakeholders named in the legislation (see Acknowledgements).

SJM 6 directed the Task Force to recommend short-term and long-term actions to ensure that the state complies with federal law, implements policies that best meet the needs of individuals receiving long-term supports and services and promotes a stable and growing workforce to meet the needs of seniors and individuals with disabilities who rely on these services to live independently in their communities.

Furthermore, SJM 6 charged the Task Force with preparing:

A. A first report of recommendations focused on ensuring that the state's Medicaid home and community-based [HCBS] services programs comply with federal regulatory provisions of FLSA;

B. A second report of recommendations on promoting long-term stability, retention and expansion of the direct care workforce to meet the growing needs of New Mexicans needing those services.

[8] A "memorial" is an expression of legislative desire that is usually addressed to another governmental body in the form of a petition or declaration of intent. Joint memorials are passed by both houses; simple memorials are an expression of only one house (New Mexico State Legislature, https://www.nmlegis.gov/lcs/lcsdocs/NMLegHandbook01-05.pdf). Retrieved 10/16/2017.

Vision of Senate Joint Memorial 6 Task Force

The Task Force began working in July 2017, opening with a declaration of its vision of direct care:

- Most consumers would prefer to live in their homes and communities, rather than in facilities. The services of qualified direct caregivers make this possible;
- All care recipients want qualified and well-trained caregivers;
- To meet future demand of consumers or care recipients seeking to remain in their own homes and communities, caregivers must be adequately paid, earning a decent wage and be able to support their own families;
- Direct care workers should be properly classified as employees or independent contractors so they receive the rights and protections to which they are legally entitled under FLSA.

Recommendations to LHHS Committee

This is the first report of recommendations to the LHHS Committee. This report is focused on ensuring that the state's Medicaid home and community-based (HCBS) services comply with federal regulatory provisions of FLSA.

Following is a discussion of SJM 6 Task Force recommendations on New Mexico's HCBS Medicaid programs as they relate to the federal Home Care Rule.

1. **In implementing the Home Care Rule, HSD must be aware of and comply with legal obligations under the Americans with Disabilities Act (ADA) and the Supreme Court's *Olmstead* decision, as well as federal and state Medicaid law.**

   The ADA provides a national mandate for elimination of discrimination against people with disabilities and specifically recognizes institutionalization as a form of discrimination (42 USC §12101). Implementing regulations from the U.S. Department of Justice require that services, including in Medicaid, are to be provided in the most integrated setting appropriate to an individual's needs (28 C.F.R. §35.130(d)). In *Olmstead v. L.C.*, 527 U.S. 581 (1999), the U.S. Supreme

Court ruled that unnecessary institutionalization of people with disabilities violates the ADA. HSD thus has legal obligations to ensure access to community-based services that go beyond Medicaid law, and direct care worker stability is essential to fulfilling those obligations.

2. **The state should establish an Ombudsman within the Department of Workforce Solutions (DWS) to address issues relating to the Home Care Rule, who should be charged with outreach and education to promote awareness and understanding of the Home Care Rule among all stakeholders.**

   The Task Force recommends that DWS Wage and Hour Division serve this role because of its independence from HSD and its expertise on federal and state wage and hour rules. Furthermore, DWS has the responsibility of collaborating with U.S. Department of Labor on wage and hour issues.

3. **The Task Force recommends that HSD conduct an analysis to determine how much should be budgeted with regard to direct care workers' potential overtime and travel time between consumers/care recipients.**

   The analysis should, at a minimum, include the number of hours worked by direct care workers, whether workers are being appropriately paid for overtime and for travel time between consumers; the adequacy and type of record-keeping necessary to support compliance with FLSA; and a review of how other states have implemented the Home Care Rule in a way that was acceptable to workers and to consumers (like CA, WA, OR, MA).

4. **If HSD determines that it must set a cap (limit) on worker hours for budgeting purposes, and that cap must be reasonable and must not increase the risk of institutionalization.**

5. **If HSD determines that caps on direct care worker hours must be imposed, both short-term (to address temporary situations) and long-term (to address ongoing need) exceptions to those caps should be allowed.**

6. **Policies and processes for care recipients/consumers to obtain exceptions must meet the legitimate needs of all participants in the system: consumers/care recipients; workers; provider agencies; and**

state agencies responsible for administration of the Medicaid program.

7. Recommended short-term and long-term exceptions are as follows:[9]

1) Exceptions should be permitted for the following short-term situations:
    a. urgent and emergency situations (e.g., the person scheduled to relieve the caregiver is delayed or cannot make the appointment, and leaving the consumer/care recipient unattended would jeopardize health and safety);
    b. caregiver is unavailable due to illness, weather, unexpected circumstances, vacation;
    c. caregiver has quit, was fired, no longer qualifies to provide services or has not yet been replaced;
    d. consumer/care recipient is traveling and can take along only one direct care worker;
    e. consumer/care recipient is in process of hiring additional worker(s) but hasn't yet found one; or
    f. other temporary need.
2) Exceptions should be permitted for the following long-term situations:
    a. consumer/care recipient has complex or specialized needs and direct care workers capable of meeting those needs are few or limited;
    b. consumer/care recipient will tolerate only certain people to provide service (e.g., client with dementia);
    c. limited availability of qualified direct care workers (e.g., tribal or rural areas); or
    d. other circumstances justifying a long-term exception.

8. The process for care recipients/consumers to obtain exceptions must be transparent, flexible and easy to navigate and readily available to the public.

[9] The Task Force reviewed others states' policies, using Oregon's as a starting point.

9. **While a consumer/care recipient awaits or appeals a decision from HSD, the consumer/care recipient should immediately qualify for the exception.**

   If the final determination is to deny the exception requested, a reasonable amount of time and resources must be provided to the consumer/care recipient so he/she may find a solution or replacement direct care worker.

10. **In establishing Home Care Rule state policies, including criteria for exceptions to hourly caps, HSD should be especially cognizant of challenges in tribal and rural areas of New Mexico.**

    Two examples:

    a. There are times when tribal communities are closed and non-residents may not enter. Thus, a caregiver who lives in the village may have to incur overtime because conditions may temporarily bar a non-tribal caregiver from providing services.

    b. Exceptions to overtime rules may be appropriate in order to assure availability of caregivers in rural or frontier areas. Therefore, overtime may be unavoidable.

11. **HSD should conduct an analysis to determine which of the many entities (state agencies, managed care organizations, consumers) involved in Medicaid-funded long-term services programs may be considered joint employers with responsibilities under FLSA.** [10]

    Under FLSA, more than one entity (payer) may be considered a "joint employer" with legal responsibility for ensuring that workers receive the pay and protections required by FLSA.[11; 12] Therefore, entities other than a family, consumer or home care agency that directly employ a worker may also be

[10] Human Services Department states that its Office of General Counsel has conducted an analysis and has concluded that the department is not a joint employer under FLSA, and that the four Medicaid managed care organizations have done their own analyses and have each concluded that they too do not have the status of a joint employer. However, those analyses were not disclosed to the Task Force. The Task Force is, therefore, unable to judge whether the conclusions reached are accurate.

[11] U.S. Department of Labor, Wage and Hour Division, "Factsheet #35: Joint Employment Under the Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Protection Act (MSPA)" revised 1/2016. https://www.blr.com/html_email/whdfs35.pdf retreived 10/16/2017.

[12] The determination of who is a joint employer under the law is based on the facts of each case, including who has power to control the employee's work, make hiring/firing decisions, or set pay rates, as well as other factors; no single factor is determinative.

considered joint employers under FLSA. HSD has responsibility under federal and state law for administration of the Medicaid program in New Mexico and is responsible for program oversight, including proper implementation of FLSA. In that role, HSD must ensure that workers paid for by Medicaid are paid in accordance with FLSA requirements, regardless of whether HSD is itself a joint employer.

When HSD acts to ensure that all entities and employers – including consumers, agencies and MCOs – comply with the FLSA, it helps all employers and potential employers avoid liability and provides increased fiscal stability for the direct care workforce.

NMDCC can recommend national experts qualified to conduct an analysis described above.

12. **HSD should provide written guidance on the 2015 Home Care Rule to all entities with whom HSD contracts and subcontracts to provide or arrange for long-term services and supports, as well as to consumers/care recipients receiving those services.**

13. **HSD should update the above written guidance whenever policies or practices are modified and/or require such guidance.**

14. **HSD and Department of Workforce Solutions should collaborate to provide guidance on appropriate classification of workers as employees or independent contractors to ensure that workers are properly classified and that they receive the compensation to which they are legally entitled.[13]**

Field research of the New Mexico Direct Caregivers Coalition (NMDCC) indicates that employers may limit direct care workers to 30 hours per week in an effort to avoid paying overtime wages. Further, direct care workers also state that some employers do not compensate them for travel time between clients. Law-abiding agency providers, workers and even consumer/care recipients--who may unknowingly be held liable as employers--would all benefit from such guidance.

[13] As stated in the U.S. Department of Labor Administrative Interpretation 2014-2, "Correct classification of workers as employees or independent contractors has critical implications for legal protections that workers receive, particularly when misclassification occurs in industries employing low wage workers. See https://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf

15. **The Task Force recommends that HSD and the Department of Health (which administers the Developmental Disabilities Medicaid waiver) seek adequate program funding for rates that allow home care agencies and self-directing consumers to meet payer obligations.**

    While the Task Force is not charged with studying budget/funding solutions, members heard input from home care agencies and nursing facilities that the rates paid in the Medicaid program are inadequate to cover costs that include pay obligations under FLSA, local minimum wage ordinances and other obligations such as providing health insurance.

16. **Any increases in reimbursement rates should be accompanied by wage "pass-throughs" in order to ensure that workers are guaranteed to benefit from rate increases.**

    A wage pass-through is an additional allocation of funds provided through Medicaid reimbursement for the express purpose of increasing compensation for direct care workers.[14]

Next Steps

Senate Joint Memorial 6 Task Force members will continue their work to develop recommendations aimed at promoting long-term stability, retention and expansion of the direct care workforce to meet the growing demand of New Mexicans requiring those services to live safely and thrive in the community.

Senate Joint Memorial 6 Task Force Phase 2 report will be submitted to the Legislative Health and Human Services Committee in October 2018.

[14] See PHINational, "State Wage Pass-Through Legislation," Workforce Strategies No. 1: https://phinational.org/sites/default/files/clearinghouse/WorkforceStrategies1.pdf. Retrieved 10/16/2017.

Explanation of Employment Data Sources

Data Sources Direct-care occupational categories are defined by the Standard Occupational Classification (SOC) system developed by the Bureau of Labor Statistics (BLS) at the U.S. Department of Labor (DOL). Definitions of the three standard direct-care occupations—Nursing Assistants; Home Health Aides; and Personal Care Aides—can be found at: http://www.bls.gov/SOC.

Employment and wage data are from the current and archived estimates of the U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics (OES) Program, available at: http://www.bls.gov/oes/#data. Inflation adjustments are made using the Consumer Price Index for urban wage earners and clerical workers (1982-84=100), also from BLS.

Note: Beginning in 2012, the BLS treats Nursing Aides as a separate occupation from Orderlies and Attendants. Data prior to 2012 refers to "Nursing Aides, Orderlies, and Attendants" (SOC code 31-1012); data from 2012 and the following years refers to the new occupational title "Nursing Assistants" (SOC code 31-1014).

The number of Independent Providers (IPs) employed in publicly funded long-term programs is estimated using PHI's counts of Independent Providers in 18 states, which are available at the PHI State Data Center http://phinational.org/policy/states/.

Statistics relating to direct-care worker demographics and employment and income characteristics are based on PHI analysis of the U.S. Census Bureau, Current Population Survey (CPS), 2012 Annual Social and Economic (ASEC) Supplement, with statistical programming and data analysis provided by Carlos Figueiredo.

Occupational projections data are from DOL/BLS, Employment Projections Program, 2010–20 National Employment Matrix, available at: http://www.bls.gov/emp/empiols.htm.

NEW MEXICO
DIRECT CAREGIVERS
COALITION

505-867-6046

www.nmdcc.org

facebook.com/NewMexicoDirectCaregiversCoalition

twitter.com/NMCaregivers

New Mexico Direct Caregivers Coalition advocates for direct care workers' education, training, benefits, wages and professional development so they may better serve people who are elderly and those with disabilities.