



New York State Department of Labor
Harriman State Office Campus, Building 12
Albany, NY 12240

Lorelei Salas
Commissioner

July 10, 2018

42 Broadway
8th Floor
New York, NY 10004

**Re: New York State Department of Labor's Proposed Rule on Hours Worked,
24-hour shifts**

Dial 311
(212-NEW-YORK)

Dear Commissioner Reardon:

nyc.gov/consumers

The New York City Department of Consumer Affairs (“DCA”) submits these comments to the New York State Department of Labor (“NYSDOL”) in response to NYSDOL’s proposal to codify the exclusion of sleep and meal periods from hours worked by employees working shifts of 24 hours or more (the “Proposal”) in the same manner as prescribed by the United States Department of Labor under the Federal Labor Standards Act.

NYSDOL’s Proposal is in response to recent litigation¹ in which home care workers prevailed against their employers who did not pay them for all hours worked of their 24-hour shifts.² NYSDOL states that the proposed rule codifies “longstanding and consistent interpretation of Article 19 of the Labor Law,” which allowed employers to pay home care workers working 24-hour shifts for just 13 of the 24 hours. Industry practice has been to *presume* that home care workers working 24-hour shift always work just 13 hours. To continue the trend of its leadership in recent years on issues affecting home care workers and paid care workers, such as nannies and house cleaners, more generally, we urge the State to build in additional safeguards for these vulnerable workers. The State must ensure that the new rule clearly places the burden on employers to prove that workers are receiving the rest and meal breaks that the 13-hour rule presumes, rather than on individual workers on a case by case basis.

Home Care Workers Face Unique Workplace Challenges, Requiring Unique Solutions

Primarily women of color and immigrants, home care workers play an essential role in New York City’s dynamic economy. New Yorkers entrust these workers to care for their loved ones when they cannot. Yet, despite the vital importance of home care workers to the daily functioning of the city and its economy, the working conditions of care workers often leave them unable to care for their own loved ones the way they care for others’. Home care workers are rarely paid a sustainable living wage and suffer from insecure and temporary employment. Their contributions are frequently unappreciated by the public, their employers, and even their clients. Hidden in private homes out of public view and working alone, home care workers are especially

¹ See *Tokhtaman v. Human Care, LLC* 149 A.D.3d 476 (1st Dept. April 11, 2017); *Andreyeva v. New York Health Care, Inc.* 153 A.D.3d 1216 (2d Dept. Sept. 13, 2017); *Moreno v. Future Health Care Servs.* 153 A.D.3d 1254, 1255 (2d Dept. Sept. 13, 2017).

² See Hours Worked, 24-Hour Shifts, NYS Reg. I.D. No. LAB-17-18-00005-P (proposed April 25, 2018)(to be codified at 12 NYCRR §§142-2.1, 142-3.1 and 143.7).

vulnerable to long and emotionally trying days, compensation that pales in comparison to the worth of their work, and denial of the most basic workplace rights and protections.

In an effort to better address care workers' distinct needs, in February 2017, the City of New York opened a first-of-its-kind Paid Care Division within the Department of Consumer Affairs (DCA). DCA's Office of Labor Policy & Standards (OLPS) houses the Paid Care Division, the only governmental office in the United States charged with raising job standards in paid care industries, including the home health care industry. To meet this challenging but critical mandate, the Division works in partnership with paid care worker organizations, employers, and other stakeholders. The Division's approach is interdisciplinary: it engages in enforcement of municipal workplace standards, policy development, outreach and education for workers and employers, intake and referral to outside resources for paid care workers, and original research.

Drawing on DCA resources and enforcement authority to meet care workers' needs and elevate their important work, OLPS launched directed investigations into possible violations of NYC's Paid Safe and Sick Leave Law (PSSL) at several dozen home care agencies. The agencies collectively employ close to 50,000 workers. Direct discussions with hundreds of workers in the course of these investigations have given DCA a vital window into the day to day concerns that home care workers currently face. And in March, DCA released a companion report, *Lifting up Paid Care Work: Year One of New York City's Paid Care Division*, with *Making Paid Care Work Visible: Findings from Focus Groups with New York City Home Care Aides, Nannies, and House Cleaners* by Professor Ruth Milkman of The City University of New York (CUNY). These reports represent a year's worth of focus group research based on discussions with 115 paid care workers about their work, in addition to the broader work of the Division during its first year.

New York State Must Continue Its National Leadership on Workers' Rights

In recent years, New York State has led the way in forging policies that begin to undo the economic insecurity and vulnerability that have long plagued home care workers and paid care workers generally. In 2010, New York State passed the Domestic Workers' Bill of Rights, which enhanced job protections for paid care workers employed directly by individual households, including protections against discrimination, securing days of rest, and unemployment compensation. In 2011, New York State passed the wage parity law, which gave most workers caring for Medicaid clients the right to a minimum rate of total compensation, including wages, benefits, and paid time off.

The rights of home care workers were expanded nationally in 2013, when the "companionship" exemption under the federal rules was narrowed, finally gaining a victory for home care workers in removing an overtime exclusion that should never have been part of federal law in the first place. At this moment, New York State can continue to lead when it comes to home care workers. It has a unique opportunity to create a standard that ensures that all hours that these workers are "required to be available for work at a place prescribed by the employer" are compensated unless workers actually receive the meal and rest breaks for which the federal rule and the Proposal make allowance.

Application of New York State Department of Labor’s Proposed Rule

Under the United States Department of Labor Rule (which the Proposal explicitly incorporates by reference), for an employer to exclude meal and sleep time from “hours worked” in 24 hour shifts, 1) the employer and the employee must agree to exclude meal periods and bona fide sleeping hours; 2) adequate sleeping facilities must be furnished by the employer; and 3) the employee must enjoy an uninterrupted night’s sleep, which has been determined to be at least five uninterrupted hours.³ With respect to meals, Section 785.19 of the Federal Code of Regulations to which the NYSDOL’s proposed rule refers states, “[b]ona fide meal periods are not worktime . . . The employee must be completely relieved from duty for the purposes of eating regular meals.”⁴

There are a number of reasons that employers must bear the obligation of demonstrating that the conditions of the federal standard are met. First, the power imbalance between the workers and employers in this industry is stark and extreme. Financial insecurity for home care workers is already very much a reality. In New York City, the mean annual earnings for a home care aide are just under \$20,000; more than a quarter live below the poverty line; and over a third receive at least one form of public assistance. Home care workers are overwhelmingly female (93%) and non-white (88%).⁵ They have access to limited employment opportunities and, in turn, have the least bargaining power with employers. Their demographic profiles contrast sharply with those who are receiving their care, and their work is performed in private homes, out of public view, and alone, making it difficult for the public to recognize the value of their work, further exacerbating the power imbalance between worker and employer.

Further, an uninterrupted five hours of sleep for these workers is rare. People have around-the-clock care for a reason; needs arise at all hours of the day. Home care workers sleep by their patients’ bedsides at night, “with one eye and one ear open” as one court described it,⁶ and must remain vigilant throughout all 24 hours ready to provide assistance. One woman interviewed by OLPS explained:

My cousin does live-in, and this woman [the client] does not sleep. Does not sleep at all. She is up all day, all night. She’ll take a little catnap, an hour here, an hour there. She is up all night long. When my cousin works for her, she is there for three days and she does not sleep for three days. And she gets paid \$13 an hour. But she only gets paid for 13 hours out of the 24.⁷

In the numerous lawsuits that have been filed about this issue, this same story is heard again and again.⁸ Workers routinely report that they are not able to effectively use the sleep and meal periods for their own

³ See Eustice v. Federal Cartridge Corp., 66 F. Supp. 55 (D. Minn. 1946).

⁴ 29 C.F.R. § 785.19 (2018).

⁵ See 2016 American Community Survey, obtained from IPUMS-USA, University of Minnesota, www.ipums.org and the 2015 American Community Survey Public Use Micro Sample as augmented by NYC Opportunity.

⁶ See Herman v. Palo Group Foster Home, Inc., 976 F. Supp. 696, 702 (W.D. Mich. 1997), aff’d by Herman v. Palo Group Foster Home, Inc 183 F.3d 468 (6th Cir. 1999).

⁷ Milkman R, New York City Department of Consumer Affairs. Making Paid Care Work Visible: Findings from Focus Groups with New York City Home Care Aides, Nannies, and House Cleaners at 23. New York City Department of Consumer Affairs; 2018 Mar 27.

⁸ See, e.g., Severin v. Project OHR, Inc., 2012 WL 2357410 at *2, (S.D.N.Y. 2012) (“Severin... testified that on a sleep-in shift, “it’s practically not possible to sleep,” and that OHR gave her “clients who woke up very many times.” Severin testified that a specific client had to be turned over in her sleep every two hours to prevent bed sores.... Cotova also testified that when working sleep-in shifts her clients frequently required her assistance during the night.”); See also Hypolite v. Health Care Services of New York, Inc., 256 F.Supp.3d 485, 490 (S.D.N.Y. 2017) (“The

purposes; that they must regularly work during scheduled meal and sleep breaks and are never relieved from work during those breaks.⁹

There is minimal guidance about what constitutes an “adequate sleeping facility” under federal law, and agency-employers do not routinely inspect homes to evaluate their sleeping facilities. OLPS is aware of home care workers who “sleep” on a cot next to their clients each night, awakened by every cough or movement or request for assistance.

Finally, no less rare than uninterrupted sleep on 24-hour home care workers’ shifts are meal breaks. Home care workers who work shifts of 24 hours or more are never “completely relieved from duty,” as meal breaks are defined in Section 785.19 of the Federal Code of Regulations. They cannot leave their clients’ homes and must be there to attend to their client’s needs at a moment’s notice.

OLPS Proposal to Strengthen DOL Rule

Because of the practical realities individual workers on 24-hour shifts face in proving – one by one, case by case – that they are not really afforded 8 hours of sleep (five of them interrupted) or three hours of meal and rest breaks, the onus should be on employers to show otherwise. The Proposed Rule should include clear guidelines for what constitutes “adequate sleeping facilities” provided by employers’ clients; it should require employers to create streamlined mechanisms for workers to report interruptions of sleep and meal breaks within 24 hours of the conclusion of their shifts; and require employers to provide adequate information to workers about their rights to be paid for all hours “worked.” Moreover, when a worker alleges that they should be paid for all 24 hours of their shift because the underlying conditions were not met, the rule should make clear that the burden rests on the employer – as it already does under the case law interpreting the Fair Labor Standards Act¹⁰ – to show that the worker did in fact receive proper meal and rest breaks as defined by the federal rules.

Analysts predict that by 2040, New York City will be home to 1.4 million seniors, with 70 percent of this population requiring long-term care at some point in their lives. Typically, the only source for funds available to households in need of care is through Medicaid, which operates under contract with the State to manage covered medical and supportive services. OLPS recognizes that the fiscal implications in a change to the payment structure for 24-hour cases presents a challenge, even more so when considering the growing demand for home care workers. Lawmakers and stakeholders, including workers, unions, and service providers, must come to the table to craft a viable, long-term solution that addresses the need to provide the necessary care, fund services and still ensure that home care workers are paid for all the hours that they actually work. In the meantime, OLPS urges the Department of Labor

plaintiff alleges... that she had to eat her meals on-the-job, for which she was not compensated; and that she was not properly compensated for sleeping time because she could not sleep for five uninterrupted hours without being awakened by her clients, and because her sleeping arrangements were uncomfortable.”(internal citations omitted.)

⁹ See, e.g. Rodriguez v. Avondale Care Group, LLC, 2018 WL 1582433, at *7 (“Rodriguez testified that she always had to work during her meal and sleep breaks. She testified that she was never relieved from work during those breaks, did not receive “adequate” sleeping facilities, and could not enjoy an interrupted night’s sleep.”) See also Shillingford v. Astra Home Care, Inc. 293 F.Supp.3d 401, 405 (S.D.N.Y. 2018) (“The Complaint recounts Plaintiff’s experiences with several clients who would wake her throughout the night to request assistance and would prevent her from taking continuous sleep breaks.”)

¹⁰ See Anderson v. Mt. Clemens Pottery, 328 U.S. 680 (66 S.Ct. 1187, 90 L.Ed. 1515) (1946).

to include mechanisms, such as those recommended above, to protect workers who are in fact working and providing much-needed services to clients during their meal and rest “breaks.”

Conclusion

Enforcement of labor laws in this industry is already challenging; OLPS’ window into this reality comes via its Paid Safe & Sick Leave enforcement, where home care workers are a leading source of overall complaints received. To date, in less than four years of enforcing the law, OLPS has recovered more than \$589,000 in restitution for home care workers and more than \$212,000 in penalties for Paid Safe & Sick Leave. Through our investigations and encounters with home care workers via the Paid Care Division, we are aware that violations of New York’s wage parity law and wage and hour law for home care workers are commonplace.

For all of these reasons, and those described above, the burden to ensure workers either genuinely receive real rest and meal breaks, or are paid for those hours of work, should be shifted to employers. Additional measures for reporting and compliance would improve the Proposal and more accurately reflect the working conditions of home care workers. Agencies are in a far better position than individual workers or even the State to take proactive steps to ensure the spirit and letter of the law are followed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Lorelei Salas', with a long horizontal stroke extending to the right.

Lorelei Salas
Commissioner
New York City Department of Consumer Affairs