
◆ ELDER LAW REVIEW ◆TM

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HOME CARE CHAOS

In 2010, the New York State Department of Labor amended the minimum wage regulations to the effect that 24 hour live-in aides were not required to be paid for three 1-hour meal periods and 8 hours of sleep time (totaling 11 hours per day). These hours were excluded from hours worked under the federal minimum wage regulations as amended by the Obama administration. As a result, the amendments allow for payment to live-in aides of 13 hours total per day.

Two recent New York State Appellate Division decisions allowed lawsuits by home care aides to go forward challenging the 2010 policy that 24 hour live-in aides may be paid for only 13 hours per day. The courts found that the 2010 policy is contrary to the state labor regulations that require that minimum wage be paid for every hour worked, unless the worker actually resides in the consumer's home.

As a result, it has become increasingly unclear how the State will be able to fund the additional pay for live-in workers in Managed Long Term Care

(“MLTC”), mainstream managed care, certified home health care agencies (“CHHA”), and in fee-for-service home care authorized by local Medicaid districts as “immediate need” services for people excluded or exempt from MLTC or managed care. Consequently, the decisions requiring additional pay have caused some home care agencies to refuse to accept new 24 hour live-in cases.

In response to the recent court decisions, the New York State Department of Labor published an emergency regulation on Oct. 25, 2017, to clarify that hours worked may exclude meal periods and sleep times for 24 hour sleep-in aides. The rule states that the regulation is “*needed 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 that treat meal periods and sleep time by home care aides who work shifts of 24 hours or more as hours worked for purposes of state (but not federal) minimum wage.*”

At the same time, the home

care industry is also dealing with closings of MLTCs. As such, the NYS Department of Health finally issued a Transition policy on September 22, 2017 addressing the transition process and giving some protection to members of plans that close. The new MLTC Policy 17.02 procedures will be used for Guildnet and North Shore LIJ Closings. The transition policy has the following protections:

1. Members of a closing plan will receive a notice from New York Medicaid Choice, the State’s enrollment broker for managed care, that if they do not select a new plan within sixty (60) days, they will be auto-assigned to a new MLTC plan.
2. The new plan must continue the same services provided by the closing plan for the longer of 120 days or until the member “agrees” to a new service plan.

About 3,000 former members of Guildnet MLTC plan in Westchester and Long Island transitioned to another plan after they heard Guildnet was closing, having received a September 29, 2017 letter telling them they may request that their hours be restored

to the amount Guildnet authorized, if the new plan reduced their hours. To request that hours be restored, they must call New York Medicaid Choice before Dec. 29, 2017 at 1-888-401-MLTC or 1-888-401-6582. If they are still eligible for Medicaid, the new plan should increase their hours to the amount Guildnet authorized. The remaining 930 Guildnet members in Nassau, Suffolk & Westchester counties received notice in mid-October that they have 60 days to select a new plan, or they will be auto-assigned to another plan. The new plan must continue the same services that Guildnet provided for 120 days or until the member agrees to a change.

On September 22, 2017, North Shore sent a letter to all of its 5,645 members in Nassau, Suffolk, and New York City advising of their closing on December 31, 2017 and indicating that unless they enroll in a different plan before November 10, 2017, they will be auto-assigned to Centers Plan for Health Living effective January 1, 2018. While the letter does not specifically say it, North Shore members should have the protections regarding keeping their same services, described above in new DOH MLTC Policy 17.02.