Abolishing the Companionship Exemption: Good Intentions but Harmful Results

By Lisa Yarkony
A new rule from the Labor Department decrees overtime pay for home care workers, a move that may complicate Jonathan’s life. Jonathan is disabled and depends on a ventilator to breathe. He has three regular caregivers who cover most of his shifts, and two of them work the majority of hours. He has had these trusted caregivers for over 20 years, but he may soon be seeing some strange, new faces in his home. Because they aren’t family and don’t live with him, their hours will be capped at 40 under the rule. This means that Jonathan will need to hire additional caregivers and the earnings for his current caregivers will be cut. Jonathan is worried that he won’t be able to find caregivers who are as skilled when their weekly pay check is less than half of what he’s been paying his current ones. If Jonathan can’t make it work, he knows he will wind up in a nursing home … or worse.

And he isn’t the only one who fears the new rule despite cheers that the “White House is giving 2 million health care workers a raise,” as the Washington Post gleefully declared. The Cato Institute was more inclined to jeer at the rule requiring time-and-a-half overtime pay for home care workers who put in more than 40 hours a week serving the disabled and aged. “This is a terrible move,” the institute sneered in no uncertain terms. “The fear and anger it has stirred is coming not just from commercial employment agencies, as some careless media accounts might leave you to believe, but above all from elderly and disabled persons and their families and loved ones who know that home attendant services are often the only alternative to institutional and nursing home care.”

But they will have less access to this valued option under the new rule, according to Andrea Devoti, chairman of the board of directors at the National Association for Home Care & Hospice (NAHC). Devoti said the changes would force home care companies to employ more workers part time because Medicaid payment rates and consumers cannot bear higher costs. “Caregivers who were hired full time will be shifted to part time,” she explained. “What it means for aides and caregivers is less work and reduced compensation. Under these circumstances, there is no way to view the rule as a boon to either patients, their families, or to federal and state governments. It certainly will not encourage more people to take on the difficult job of personal care assistant or home health aide. In the end, it will cost individuals, home health agencies, and governments billions more. Yet the end result will be less care, not more,” a consequence that the Labor Department blithely ignored when it changed a rule that dates back 39 years.

Home care aides have been exempt from federal wage laws since 1974 when they were placed in the same “companionship services” category as baby sitters. But that will change when the rule goes into effect in 2015, a date meant to give states and agencies time to adjust to all the changes in store. The biggest change is that third-party employers, such as home care agencies, will no longer be able to claim the exemption for workers who provide companionship services. Another change will be to narrow the scope of the term “companionship services” and limit the care-related services aides can perform each week. According to the Labor Department activities such as helping patients out of bed, take a bath, get dressed, and feed themselves must be secondary to fellowship and protection that companions provide. If aides spend more than 20 percent of total hours performing care services in a given workweek, agencies will be required to give them overtime pay. Consumers alone can claim the exemption, but they, too, will have to pay overtime to workers who devote more than 20 percent of their time to giving care — instead of simply keeping a patient company or passing the time with them in recreational activities such as playing cards.

The stated intent of these changes is to give home care workers the same legal protections as most other employees. “Health care workers are no longer treated like teenage babysitters performing casual employment under this final rule,” said Labor Secretary Thomas Perez. “They are treated with dignity and their hard work is indeed rewarded,” — as it should be. No one disputes that home care workers are essential to this nation’s future. We should do everything possible to show home health aides and personal care assistants that they are respected and valued.

Yet the new rule will have the opposite effect, Devoti points out based on the facts. “The experiences in states
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that previously eliminated the companionship exemption indicate that workers get fewer hours and less total pay,” she explained. “The reason for this is that most home care is paid for under government programs, such as Medicaid, that set payment rates. Home care agencies have no way to cover the increase in costs for overtime compensation, so they can only limit their caregivers’ hours,” a prospect that our nation’s largest state has already discussed. “Earlier this year California Governor Jerry Brown suggested that the state may need to prohibit any caregivers funded under its Medi-Cal program from working over eight hours in a day and over 40 hours per week to avoid the added cost of overtime pay.”

Do these valued workers deserve to be paid fairly for their work? In theory, yes, Devoti would heartily agree. “But the central problem with this rule change,” she says, “is that it is occurring in isolation from other changes that are needed to make it work. There is no concurrent change in Medicaid rules that would require a revision in payment rates to cover this cost. Also, there is no support offered to the many aged and disabled persons who are on limited incomes yet pay out of pocket for the home care services that will let them stay out of nursing homes and other institutions. We support fair compensation to the hardworking caregivers who assist the most vulnerable people in our country. But that added pay does not just come out of thin air,” Devoti said, expressing NAHC’s long-term stand against changes to the rule.

Since the 1990’s NAHC has fought off attempts to narrow the companionship exemption. Twice NAHC has built a coalition to beat back legal challenges which with union backing went all the way to the U.S. Supreme Court. The Court by a margin of 9-0 sustained and embraced the companionship exemption. The losing parties decided to bring the issue to Congress but were rebuffed by the Republican controlled House of Representatives. Their final play was to appeal to the Administration and win the confirmation of a Secretary of Labor who would unilaterally change the rule. Member of the House of Representatives held hearings where NAHC testified. Last year NAHC and its affiliated Private Duty Homecare Association of America conducted a survey of 1,500 agencies, a sample of those who would be most affected by the new rule.

The survey results showed that ending the overtime exemption for home care workers will have serious negative consequences for workers, clients/patients, and home care companies. The major impact on workers is the cut in hours triggered by the home care companies’ efforts to control costs. Nearly 63 percent of the respondents who had to pay overtime under state law said they restricted overtime hours. More than 86 percent of the companies that will face a new overtime requirement under the rule said they would restrict the hours worked by staff to prevent overtime costs. And workers won’t be the only ones to lose out. The survey showed that 81.8 percent of companies expect to increase their private pay billing charges and 23.7 percent expected to scale back the availability of care. The result will be less...
continuity of care brought on by the need to assign multiple caregivers to control overtime costs. In response, some respondents remarked, clients would hire workers “under the table,” where they would lose the quality control and oversight that agency workers provide.

Patients would suffer, agreed the National Association of State Medicaid Aging, and Disability and Developmental Disability Directors who said of the new rule: “We are deeply disappointed that the Administration ultimately failed to adopt a rule that balances fair compensation for home care workers with the equal critical goal of assuring the ability of older adults and people with disabilities to maintain their independence at home and in their communities. Implementation of this rule will require additional funding and may result in the cost of supporting in their homes becoming prohibitive.”

If that happens, federal programs like Medicaid will end up paying a great deal more with no improvement in access to care or in its quality, Devoti said. “Like the disability community, we believe it is better policy to affirm the decision of the U.S. Supreme Court which unanimously sustained the validity of the companionship exemption as it had been applied for over 35 years. We believe there is much that Congress can do to put this matter right — which means helping people to receive the quality care they need and at the same time giving caregivers a fair and honorable wage. The federal wage and hour laws were written when most health care was received in institutional settings. Today more and more care is delivered in the home setting. These laws need to be reevaluated by Congress in total rather than piecemeal fashion. The central focus should always be what is best for the people needing care.”

Given all that’s at stake, NAHC, along with its affiliates the Private Duty Homecare Association and the National Council on Medicaid Home Care, is exploring further advocacy efforts on the rule change, including federal court litigation and congressional legislation. They already have support from two members of the House Education and Workforce Committee who pointed to estimates showing the new rule could lead to a $2 billion increase in health care costs over the next decade. “Faced with higher costs, some individuals will have no choice but to leave their homes and enter institutional care,” said Committee Chairman John Kline (R-MN) and Rep. Tim Walberg (R-MI), who chairs the panel’s subcommittee on Workforce Protections.

Rep. Jim Langevin (D-RI) also came out against the rule in a recent interview with NAHC President Val J. Halamandaris. Langevin is a quadriplegic who has received home care for most of his life. He’s also an expert on issues involved in the rule change, and he worries about the consequences it will produce. “I’m concerned,” he said, “both for the people receiving the care and for the people who are giving the care. I believe in and I value greatly the services of the people who have assisted me over the years. But I understand that without greater reimbursement reform and more resources, it will be very difficult to see a change in the rule.” And the results could be grim, he warned, if the rule does go into effect. “I think you would potentially see less care for the persons who need it and hours cut back for the caregivers who provide it. Neither patients nor caregivers would benefit from the rule change; it might actually put them both at a disadvantage,” Langevin said. And many aged and disabled share his concerns. They know this ruinous rule could rob them of the chance to have independent lives at home.

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