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ALL THE WORK, HALF THE PAY

Home health care aides may finally get paid for every hour they work. But the change could bankrupt the industry PAGE 18

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TAKING A STAND

Recent court rulings could upend the industry that cares for elderly New Yorkers BY CAROLINE LEWIS

Lai Yee Chan worked piece-rate in the city's textile factories for more than a decade to support her three children after she emigrated from China in the late 1980s. She sometimes labored until 2 a.m. for such brands as DKNY and saw co-workers faint from the stifling summer heat in a Midtown warehouse.

Chan's current workplace, the apartment of an elderly man with Alzheimer's who was partially paralyzed by a stroke, looks nothing like the factory floor. But during the seven years when she cared for him in 24-hour shifts, it felt like a sweatshop just the same.

Chan is part of a cohort of New York home care workers that has filed more than a dozen class-action lawsuits against employers to challenge an industrywide practice known as the 13-hour rule, a state-sanctioned

HOURLY WAGE: Chan is suing to change how 24-hour home care workers are paid.

BUCK ENNIS, ISTOCK

policy in which home care workers are paid for just 12 or 13 hours of a 24-hour shift.

"Getting paid for 12 or 13 hours is exploitation," said Chan, 62. "This should never have happened in a civilized society."

Last month a panel of state appellate court judges agreed. After reviewing two of the lawsuits, the judges ruled that the 13-hour policy was illegal. Although the agencies named as defendants, New York Health Care and Future Care Health Services, want to appeal the decisions, Chan is hoping the rulings will be upheld and serve as legal precedent in her own case.

As Chan and her colleagues celebrated last month, owners of the state's 1,500 or so registered home care agencies were frantically contacting their trade associations for guidance on what to do next. They had followed the lawsuits for years through multiple appeals and delays, and now their worst fears were materializing.

Eliminating the 13-hour rule would effectively double the cost of providing the round-the-clock assistance many elderly and disabled New Yorkers rely on to remain at home. The rulings also could put agencies on the hook for back wages for any employee who worked a 24-hour shift in the past six years, according to the statute of limitations in New York. That alone could amount to billions of dollars, one trade group estimated. Many of the agencies are nonprofits operating on tight margins and say they could be forced to shutter.

"As far as potential costs, it will destroy the industry," said Matthew Hetterich, director of corporate business development at Utopia Home Care, based in Kings Park, Long Island, and president of the Long Island Chapter of the New York State Association of Health Care Providers.

How the state's court cases are resolved could determine the future health of home care agencies, the well-being of workers and the choices that families make about the care of their loved ones.

The cost of caring

Home care is one of the fastest-growing areas of employment in the country, driven by demand from an aging population and a seismic shift in the health system away from costly institutions such as hospitals and nursing homes. In New York home care employed nearly 200,000 as of July, an 8% increase over July 2017. The lion's share, about 149,000, work in New York City, where the home care workforce grew by 12% during that period.

That growth has put a lot of pressure on the industry. New York's Medicaid program, which insures low-income residents, is the largest source of revenue for many home care employers. Some agencies rely on it for more than 90% of their income. Medicaid spent $7.2 billion on home care in fiscal 2017, with the state and federal governments splitting the tab.

But state officials have stubbornly clung to the 13-hour rule to help keep costs down.

"As an industry we can only pay our workers what we're getting paid," said Hetterich. "This is not the case of an evil business that wants to make more and more money."

The home care agencies named in the class-action suits have pointed to a 2010 opinion letter from the state Department of Labor asserting that aides can be paid for 13 hours of a 24-hour shift. (Workers are also supposed to get three hours for meals and eight hours of sleep during each shift, at least five of which are uninterrupted—something aides say is far from guaranteed.) The department based its guidance on a minimum-wage exemption for workers who live full time with their clients.

But the September state appellate court decisions ruled that the Labor Department erred in its interpretation of the law. Employees who don't live with their clients full time must be paid for all the hours they are at work, regardless of whether they are sleeping or eating on the job, the judges said.

Asked about next steps, the Health Department said it is currently reviewing the rulings. The state Department of Labor did not return *Crain's* requests for comment.

24-hour shifts

While working 24-hour shifts in Chinatown between 2007 and 2014, Chan's workday did not really start or end. She would wake up in a bed catty-corner to the one her client slept in, make him oatmeal for breakfast, bathe him, clothe him, clean the apartment and launder his clothes. When her client had the energy, she would lift him into his wheelchair and take him to church or to hear music in nearby Columbus Park. His lunch and dinner were meals that she cooked, blended into the consistency of baby food, and fed to him.

At night, while he slept, she monitored his breathing, periodically helped him shift positions and changed his diaper every two hours, the same as in the daytime.

As his Alzheimer's progressed, he often woke up yelling. Chan would try whatever she could think of to get him back to sleep. "Hear that siren?" she would ask in Cantonese, their shared language, if an ambulance went by outside. "If you don't go back to sleep, they'll take you away."

That line rarely worked, Chan said with a chuckle. On a summer afternoon a few weeks before the rulings were handed down, Chan chatted with other home health aides as they shared a box of sweet buns at the Chinese Staff and Workers' Association, a grassroots labor organization in Chinatown.

The women, current or former employees of the Chinese-American Planning Council Home Attendant Program, are plaintiffs in two class-action lawsuits pending against the nonprofit home care agency. Speaking through a translator, the women agreed that their profession can be incredibly isolating.

"In home care you face the same person every day," said Chan. "The patient doesn't speak much. In the garment factory, you can talk among the workers. You can chat."

Home health aides who had worked for various agencies told *Crain's* they suffered from depression as well as physical injuries from lifting patients while working 24-hour shifts.

One such worker, Leticia Panama Rivas, a 40-year-old Queens resident from Ecuador, said working as

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HOME CARE ECONOMICS

AROUND THREE-QUARTERS of Americans over age 40 would prefer to receive long-term care in their own home, a 2016 survey conducted by the Associated Press and the University of Chicago found. Whether they can afford it is another matter.

Medicare, the federal health plan for people over 65, does not pay for long-term care, contrary to what 4 in 10 Americans think. And if a patient does not have private long-term care insurance, home health aides must be paid for out of pocket until the patient's savings are depleted enough to become eligible for Medicaid, the state insurance program for people earning up to 138% of the federal poverty level.

To be eligible for Medicaid, an individual cannot have more than $825 in monthly income and $14,850 in assets. Putting money into a trust for the next generation is one of several legal loopholes people exploit in order to qualify.

Often families must make tough decisions to get their loved ones the care they need. Bronx resident Susan Maloney said her mom, who suffered from dementia in her final years, received several years of 24-hour home care before her death last year. At first Maloney, a hospital administrator, said, "We thought it was best to go through an agency because if someone's out sick or goes on vacation, they can send a replacement."

But, she said, "Getting someone who actually cared about what they did and cared about my mom was difficult because most felt they were being taken advantage of."

Maloney's mom had planned ahead and paid into a generous long-term-care insurance policy. But Maloney paid out of pocket to stretch the hours it paid for and to supplement the caregivers' wages because she felt the home-care agencies paid them too little.

Eventually she decided it would be more affordable and the aides would make more if she just hired them directly.

"The problem is, near the end, when both of the aides we hired started having personal crises at same time, there was no backup," Maloney said. "It was the most stressful thing I had ever gone through."

By the time Maloney's mom moved into the nursing home where she spent her final year, Maloney had spent about $100,000 of her parents' and her own savings on home care, in addition to what insurance paid.

Maloney tried to keep her mom in the Brooklyn apartment she had lived in for 50 years for as long as possible. "Even though people were passing away, she still knew some people," said Maloney. "She would go outside and sit on the benches. She had a social circle."

But there were advantages to eventually putting her mom in a nursing home in the Bronx, Maloney said. "She had a pretty good quality of life while she was there. And when I visited, I didn't have to make grocery lists; I could just sit and spend time with her." – C.L.

a home attendant 24 hours a day, five days a week for four years left her with a back injury and a failed marriage. "I never saw my husband," said Rivas, who is involved in a class-action suit against her former employer, First Chinese Presbyterian Community Affairs Home Attendant Corp.

For her part Chan cobbled together part-time hours from different agencies for about seven years before she was assigned to her 24-hour case. The job kept her away from her husband in Brooklyn for three to five days at a stretch. But working longer hours did not substantially improve her family's finances. Only during the period when Chan was at her client's home five days a week, 24 hours a day, did her income surpass $30,000 per year.

Chan accepted the 24-hour assignment, fearing, like many home health aides, that if she didn't, her agency would slash her hours or make her wait months for another job.

It was not until she got a mysterious check for about $250, which the Chinese-American Planning Council said was compensation for all of the overtime she was owed between 2007 and 2013, that she started to question the legality of the 13-hour rule. "The check kind of opened my mind," she said.

Chan and two colleagues filed suit against the Chinese-American Planning Council in March 2015, with a petition for class-action status. She was encouraged by a Manhattan Supreme Court judge's decision in September of that year not to grant her employer's request to dismiss the case.

She never guessed it would be her union, 1199SEIU United Healthcare Workers East, that would prevent the trial from proceeding in court.

Growing pains

Demand for home care is expected to accelerate as the baby-boom generation ages. But a labor shortage is already underway.

"We have a very challenging environment with respect to recruitment and retention of staff," said Al Cardillo, executive vice president of policy and program services at the Home Care Association of New York State. "Dealing with turnover is a major expense."

Home care agencies in New York turn away an average of 37 cases per month because they are short-staffed, according to a recent survey by the Home Care Association. At least three agencies reported having to decline more than 100 cases each month.

Recruitment has gotten tougher in part because minimum-wage increases in the state mean workers can now earn just as much in fast food and retail, industry leaders say.

A decade ago, the state minimum wage was $7.15 per hour, and home care workers typically earned about $10 per hour. That was a blessing for attorney Thomas Small, a 52-year-old Brooklynite with spinal muscular atrophy. Small participates in the state's Consumer-Directed Personal Assistance Program, which allows people to use their Medicaid benefits to recruit and hire aides directly.

"It wasn't uncommon to get 40 or 50 people to respond to a Craigslist post, and I could weed through applicants and find people who were really good," said Small, who is policy and outreach director at Concepts of Independence, a nonprofit that helps administer the state's personal assistance program. "Now I run an ad and get five or six responses."

While some are demanding a greater investment in the home care workforce, the Cuomo administration is helping employers cope with the gains their employees have already made in recent years, including the minimum-wage increase. The state is investing $6 billion in new funds in the home care workforce between fiscal years 2015 and 2021, the Health Department said. Yet some in the industry say it is still not enough.

A feeling of betrayal

In late June 2016, Chan marched to the front desk of her union's headquarters and delivered a petition with 70 signatures demanding that 1199 "make a serious effort to investigate whether there was any wrongdoing, illegal activity or corruption conducted by the union staff in dealing with workers' pursuit of their back wages."

In December 2015, months after Chan's case had been filed and the motion to dismiss it had been denied, 1199 finalized an agreement with the Chinese-American Planning Council amending their contract. It added a section requiring that all claims asserting that the Chinese-American Planning Council violated state or federal labor laws must be resolved through private mediation and arbitration. The provision, which has become increasingly common in home care contracts, was voted on by union members and ultimately added to all the labor agreements 1199 had negotiated with 50 home care employers, said Helen Schaub, state policy and legislative director for 1199.

THE DEMAND FOR HOME CARE WORKERS IS RISING IN NEW YORK, BUT THERE IS ALREADY A LABOR SHORTAGE

A judge decided the provision could apply to Chan's case retroactively and ordered Chan and her employer into arbitration.

The union said it added the arbitration clause because it is more expedient than going through the courts and would benefit workers. Chan disagreed.

She was further disappointed by her union's decision not to pursue the claim that the 13-hour rule violated state and federal regulations. The union opted to represent only the workers' claims that they did not get the requisite sleep and meal breaks.

By 1199's estimate, just 8% of the state's home care workers are assigned to 24-hour cases. "From our perspective, in terms of how to best represent our members, we spent a lot of time and energy winning the $15 minimum wage, which affects 100% of members, versus a smaller portion working on live-in cases," Schaub said.

Chan's case is now in mediation. But the feeling that her powerful union abandoned her persists. As she and others lost faith in 1199, their relationship with two independent labor organizations, the Chinese Staff and Workers' Association and the National Mobilization Against Sweatshops, deepened.

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THE AVERAGE NUMBER of cases home care agencies turn away every month

100

CASES PER MONTH turned down by at least three home care agencies

Home care workers spread awareness of their campaign to end the 13-hour rule via word of mouth, while labor organizers drew up fliers asking in multiple languages, "Do you work long hours? Are you paid for all the hours you work of your 24-hour shift? And overtime pay?"

The fliers further implored, "Join us!"

Home care workers who showed up at the labor groups' narrow, adjacent offices on Grand Street were connected with lawyers at the Urban Justice Center, Virginia & Ambinder, and other firms. Chan and fellow home health aides celebrated last month's court decisions alongside organizers and labor lawyers. They said their fight is just beginning.

"Often you win this judgment in court and it ends up just being a piece of paper because it's so easy for employers to move money around and essentially plead bankruptcy and not pay," said Sophie DeBenedetto, an organizer with National Mobilization Against Sweatshops.

The Chinese-American Planning Council Home Attendant Program has already insisted it doesn't have the money to pay, said Chan.

Making it work

The director of the Chinese-American Planning Council Home Attendant Program and several other home care executives declined to speak to *Crain's* about the 13-hour rule.

One firm that did comment was Hometeam, a venture-backed startup that serves a mix of private-pay and Medicaid patients and has built its brand on creating well-paying careers for home health aides.

But Hometeam too has taken advantage of the 13-hour rule. A classified ad that the company posted online in August for sleep-in positions in New York City offered $154 for a single 24-hour shift—the equivalent of $6.42 per hour. Only aides working at least four 24-hour shifts in a week would earn overtime, upping their hourly wage to the equivalent of $7.14.

"I don't think it's unreasonable to want an aide to be paid [for all 24 hours]. I want aides to be paid that," said Josh Bruno, founder and chief executive of Hometeam, in an interview at his company's Chelsea headquarters in May. "But it's true to say we would have sweeping changes and change a lot of people's lives if that happens."

In the private-pay market, Bruno said, families will likely find alternatives to home care if it becomes too expensive.

It has already become harder for Medicaid patients to be approved for 24-hour home care, thanks in large part to the Cuomo administration's Medicaid-reform efforts, said David Goldfarb, a Manhattan attorney specializing in elder law.

Rather than being reimbursed directly from the government, home care agencies typically contract with managed-care organizations in order to get paid. The state pays the plans a set amount up-front to cover the needs of each Medicaid beneficiary, which incentivizes them to control the cost of care.

Moving forward, Goldfarb said, "I think the state is going to have to recognize that the funds have to be made available to cover whatever the law says you have to pay people for continuous care."

ISTOCK, BUCK ENNIS

But changes intended to benefit workers could lead to unintended consequences, said Allison Cook, New York policy manager at PHI, a national advocacy and training organization for home care workers that is affiliated with a home care agency in the Bronx.

In 2015, for example, the Obama administration extended to home care workers the minimum wage and overtime protections that have been afforded to other workers for decades under the Fair Labor Standards Act. Agencies then began splitting up individual cases among workers in order to avoid paying overtime, Cook said. As a result more aides now divide their time between multiple agencies to survive.

Despite rate increases from the state, insurers still are not paying enough to cover overtime, said Hetterich of Utopia Home Care. Ultimately, he said, patients pay the price.

"When the Fair Labor Standards Act changed and new overtime rules were implemented, we had a lot of comments from families about having two or three different caregivers," he said. "The biggest concern from the industry standpoint is, we do a lot of work with elderly patients who suffer from Alzheimer's and dementia. People with those diseases don't handle change or strangers very well."

Another wage mandate could push more of the home care industry into the informal economy, at least for those who can afford to pay out of pocket, warned Bruno.

"Instead of aides choosing to work through agencies, they will increasingly choose to work independently," Bruno said. "Families and aides will meet in the middle somewhere, but it will be in the gray market."

Some success

Chan is not waiting on the courts to improve her working conditions. In 2014 she consulted with her client's wife about splitting each 24-hour shift in two. There was already another aide working the days that Chan was off, and at first her client's wife was concerned about the prospect of having four aides instead of two, Chan said.

Eventually the wife agreed. After her client's insurance plan sent an inspector to his home, the patient was approved for what is known as a split-shift case in December 2014, Chan said.

Medicaid plans can authorize split-shift care if a patient requires assistance with such tasks as going to the bathroom and changing positions with "such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight-hour period of sleep," according to the Health Department's website.

But insurance plans are reluctant to approve the arrangement because of the cost, elder law attorney Goldfarb said.

Healthfirst, the Medicaid plan that insures Chan's client, declined to discuss its policies on split-shift cases, as did the Health Department.

Some consumer advocates raise concerns about splitting up cases. "Patients grow attached," said Maria Alvarez, executive director of the Statewide Senior Action Council. "It's a very personal thing."

But Chan said the change has made a big difference. "It's better for our jobs and improves our health, and it also allows the patient to get better service," she said.

Now that she is not exhausted all the time, Chan has the energy to engage her patient more. He has even begun talking a little.

"I ask him, 'Who am I?'" Chan said. He cheekily answers, "Chan Gu Niang," using the Chinese honorific usually reserved for younger women.

"I ask him, 'Who is your friend?'" Chan said. "And he says, 'You.'"

The demands of workers and organizers go beyond full compensation, said DeBenedetto of the National Mobilization Against Sweatshops. Her organization will continue to encourage workers to sue their employers for back wages, but it also is seeking to work with legislators, consumer-advocacy organizations and other groups to draft legislation ending mandatory 24-hour shifts.

If the decisions striking down the 13-hour rule are upheld, the state could re-evaluate everyone approved for 24-hour care and convert the more demanding cases into split-shifts, said Bryan O'Malley, executive director of the Consumer Directed Personal Assistance Association of New York State.

"Some people would be able to switch from live-in to 13-hour care, and people would leave at the end of the day," he said. "But many people would still need 24/7 care, and it would certainly drive up the cost of providing services. There's already increased pressure on Medicaid, and this would certainly exacerbate that."

Denying aides full pay for all the hours they are on call poses its own threat to the system, said Carmela Huang, Chan's attorney from the Urban Justice Center.

"If these workers are denied their full rights," Huang warned, "we're creating a permanent underclass of workers who are engaged in some of the most difficult and important work." ■

CARRASCO WORKS 24-hour shifts six days a week for two agencies but doesn't qualify for overtime.

WORKING OVERTIME

CARMEN CARRASCO, a 65-year-old Brooklyn resident who moved to the United States from the Dominican Republic when she was 19, gets to sleep in her own bed only one night a week. She splits her time between two 24-hour cases for two agencies. Although she is on call 72 hours per week for each agency, she does not earn overtime pay from either one. Under the so-called 13-hour rule, only 39 of the 72 hours she works are tallied.

WEDNESDAY THROUGH FRIDAY

Anibal Carrasquillo, a bedridden 47-year-old born with cerebral palsy, cannot form words. But it is no secret how he feels about Carrasco, his aide of 15 years. He smiles broadly when she enters his room in the apartment he shares with his mother in a Lower East Side housing project overlooking the FDR Drive.

For lunch on a Wednesday afternoon in August, Carrasco prepared noodles with ground turkey, blended into an orange paste. Spooning the food into her patient's mouth as he watched *Two and a Half Men* in Spanish on the TV above his bed, Carrasco sometimes had to remind him to swallow. "Coma, coma, coma, Papa," she said. "Swallow, swallow, swallow."

More than once during the hourlong meal, Carrasquillo opened his mouth wide, mischievously exposing the food inside. "Oh, how lovely," Carrasco responded in Spanish.

Taking care of Carrasquillo three days a week requires superhuman patience, but he has stolen Carrasco's heart. "He's a sweetheart," she said in Spanish. And while she must attend to the occasional nighttime diaper change, she usually gets enough sleep.

She has learned the hard way, however, that no two cases are alike.

SUNDAY THROUGH TUESDAY

A few blocks from her apartment in Williamsburg, Carrasco cares for a woman whose husband died last year. The husband had Alzheimer's and required constant care, especially near the end of his life, when he would complain of the pain he suffered at night.

"He didn't sleep at all at night," Carrasco said. "He didn't let me sleep."

Caring for both of them earned Carrasco only an extra 50 cents an hour, standard in the collective-bargaining agreements 1199SEIU United Healthcare Workers East negotiates with employers.

"I was dying to get out of that situation because I was getting sick," Carrasco said. In addition to feeling stressed and exhausted, she had to be rushed to the hospital twice for vertigo.

But when she complained to her coordinator about the assignment, Carrasco said, she was told to hold out just a little longer.

"He eventually died," Carrasco said. "*Gracias a Dios.*"

Although Carrasco plans to retire soon, she has joined the movement to end the 13-hour rule. She is one of three named plaintiffs in a class-action suit filed in June against the United Jewish Council of the East Side Home Attendant Service Corp., where she was employed from 2000 to 2015.

"I don't know what's going to happen," she said, "but there has to be radical change." – C.L.