

Senate Joint Memorial 6 Task Force Phase 2 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



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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.



Executive Summary

In 2013, the U.S. Department of Labor (DOL), recognizing “the changes to the home care industry and workforce,”^{1;2} 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 second report of SJM 6 Task Force. While the Phase 1 Report focused on ensuring that the state’s Medicaid home- and community-based (HCBS) services comply with federal regulatory provisions of Fair Labor Standards Act (FLSA), this Phase 2 Report is focused on promoting long-term stability, retention and expansion of the direct care workforce to meet the growing needs of New Mexicans needing those services.

Fair Labor Standards Act and Senate Joint Memorial (SJM) 6

The “direct care workforce” includes Nursing Assistants; Personal Care Aides; Home Health Aides and related direct care occupations.³ 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

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

² Wage and Hour Division. September, 2013. <https://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm>. Retrieved 10/22/2018.

³ 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, housekeeping, meal preparation, transport to/from doctor’s offices and other activities.





captured in these counts, were employed across the country in public programs that provide personal care services. Independent providers are employed directly by consumers.⁴

Caregivers may work in institutional facilities like nursing homes or in the homes of individual care recipients. Their work in community settings is key to allowing elders to age in place and remain in their own homes rather than entering institutional care, and to allowing persons with disabilities—whatever their age—to live independently and participate in their communities to the greatest possible extent.

In New Mexico, more than 61,000 people worked as direct caregivers in 2016.⁵ Demand for these services will continue to grow. By 2030, New Mexico is projected to rank fourth in the nation in percentage of its population aged 65 and older.⁶ Indeed, the need for direct care workers will grow by more than 40% as early as 2024—and this is in addition to the 277,000 New Mexicans already working as unpaid family caregivers!^{7;8}

Ensuring a sufficient supply of direct care workers is key to the state meeting its legal obligations under the Americans with Disabilities Act (ADA) and the U.S. Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the decision that called on states to move away from institutionalization and to provide community-based services that support individuals in living in the most integrated community setting possible. This will be impossible without an adequate number of caregivers to furnish the essential services that allow people to remain in their own homes.

The vast majority of the direct care workforce is female, and many workers are members of minority groups and/or immigrants. Average pay in New Mexico is \$9.51 per hour, which is below the already low national average of \$10-\$12/hour, and so low that caregivers often must hold multiple jobs to meet their families’ needs. More than half of all caregivers earn wages that place them and their families at or below 200% of the Federal Poverty Line. Approximately half of New Mexico’s direct care workforce qualifies for public assistance (though many may not be actually receiving it). In addition to low pay, direct care jobs often do

⁴ PHINational, PHI Facts 3. November 2013 Update. See <https://phinational.org/sites/default/files/phi-facts-3.pdf>. Retrieved 10/16/2017.

⁵ U.S. Department of Labor, Bureau of Labor Statistics, *May 2016 State Occupational Employment and Wage Estimates – New Mexico*. https://www.bls.gov/oes/2016/may/oes_nm.htm#33-0000. Retrieved 9/19/2018.

⁶ 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.

⁷ 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.

⁸ AARP Public Policy Institute, *Across the States 2018: New Mexico State Profile*. August, 2018.





not come with standard employee benefits like employer-sponsored health insurance and paid leave.

Beyond adequate pay and other job protections, a quality workforce requires that caregivers have the necessary skills to do the work. Unfortunately, many report feeling unprepared to sufficiently perform their daily tasks.⁹ Inadequate training affects the quality of services rendered, may lead to caregivers being sick or injured on the job, decreases overall job satisfaction and results in turnover. And, when workers do leave their jobs, care recipients lose access to the caregiver they know and trust. Thus, the burden on provider agencies to recruit then retrain new staff is exacerbated.

For many years, direct care workers providing services in the community were deliberately excluded from both federal and state law providing for minimum wages and other job protections. The federal FLSA of 1938 laid out standards requiring 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 work week¹⁰ and reimbursement for certain types of mileage. However, caregivers were omitted from the Act's protections. Even today, New Mexico law explicitly bars domestic workers from employment protections accorded to other workers.¹¹

This unjust and unjustified exclusion was rectified at the federal level in 2013, when the U.S. Department of Labor (DOL), recognizing “the changes to the home care industry and workforce,” revised its regulations under FLSA to extend the law’s reach to the more than four million homecare workers in the United States.¹² The FLSA “Home Care Rule” provided basic labor protections intended to improve working conditions for caregivers, a step seen as not only benefiting workers but also as strengthening the direct care workforce. Unfortunately, New Mexico’s statute has not been changed to bring it into line with federal law and to treat home care workers equally with other workers in having their rights protected under state law.

SJM 6 was passed by the New Mexico legislature during the 2017 session.¹³ The memorial created a task force to study direct care programs funded by Medicaid. The New Mexico

⁹ Engstrom, M., & Wadensten, B. (2010). *Caregivers' job satisfaction and empowerment before and after an intervention focused on caregiver empowerment*. *Journal of Nursing Management*, 18, 14–23.

¹⁰ “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>.

¹¹ Sec. 50-4-1(A) NMSA 1978.

¹² Final Rule, 78 Fed. Reg. 60454 (10/1/2013).

¹³ 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.





legislative memorial directed New Mexico Direct Caregivers Coalition (NMDCC) to convene stakeholders named in the legislation (see Acknowledgements).

SJM 6 Process and Vision

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. SJM 6 further charged the Task Force with preparing:

- A. A first report of recommendations focused on ensuring that the state’s HCBS Medicaid 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 requiring those services.

When it began its work, the Task Force developed its vision for direct caregiving:

- Most consumers prefer to live in their own homes and communities rather than in facilities. The services of qualified direct caregivers makes this possible.
- All recipients want qualified and well-trained caregivers.
- To meet future demand for caregiving services and allow recipients to remain in their own homes and communities, caregivers must be adequately paid so they earn a decent wage and are able to support their own families.

SJM 6 called for a first report in October 2017, addressing short-term actions needed to make sure the state complies with FLSA in connection with HCBS covered in the Medicaid program. That report was presented to the Legislative Health and Human Services Committee in October 2017. See <http://nmdcc.org/wp-content/uploads/2017/12/Senate-Joint-Memorial-6-Task-Force-Phase-1-Final.pdf>.

The second phase of the SJM 6 Task Force’s work was to look at longer-term issues related to caregiving and “to make recommendations to promote a stable and growing workforce to meet the needs of New Mexico’s seniors and persons with disabilities who need long-term services and supports to live independently in their communities.”¹⁴

The Task Force held its first meeting of this second phase of work in December 2017. In addition to available federal and state data, members agreed that hearing directly from paid

¹⁴ SJM 6 (2017), p.4.





and unpaid caregivers, care recipients and employers of direct care workers would help them in understanding the state's workforce needs.

Accordingly, a series of "Listening to Caregivers" sessions were scheduled around the state in the spring and summer of 2018 and were designed to hear directly from a broad group of stakeholders. Ten such sessions were held between April-August 2018, in Albuquerque, Farmington, Las Cruces, Las Vegas and Roswell.

The comments received at the listening sessions were wide-ranging. While some issues clearly pertained to either professional workers or unpaid family caregivers, others overlapped and were applicable to both groups. A summary of the comments may be viewed at <http://www.nmdcc.org/sjm-6-tf>. Based on input from the listening sessions and Task Force discussions, the SJM 6 Task Force offers the following findings and recommendations.

Findings of SJM 6 Task Force

- 1) Direct caregivers are a key part of the health care and disability services system. It is essential that we, as a state, take steps to ensure that there are sufficient numbers of qualified caregivers to meet the needs of New Mexico's growing population of seniors and persons with disabilities.
- 2) Caregiving is a challenging and demanding role, both in terms of the physical tasks required and in working with individuals who may have cognitive disabilities and/or behavioral health issues.
- 3) Working conditions for direct care workers must be improved to ensure an adequate supply of qualified caregivers will be available to meet the increasing need.
 - a) Pay for caregivers is low and generally does not provide a living income for workers. Combined with the frequent lack of job benefits such as health insurance, this both makes it hard to attract workers to the field and increases turnover.
 - b) Caregivers do not feel that they or their profession are valued, or given the respect they deserve for the difficult and important work they do.
 - c) Opportunities for career advancement are limited, a situation exacerbated by the lack of regular, adequate and accessible training for workers, making the field less attractive to potential and current workers and contributing to workforce shortages and turnover.





d) Legal requirements for minimum wage and overtime pay, and pay for travel time are often not met. There is inadequate oversight to ensure that workers are treated fairly and in accordance with the law.¹⁵

e) While some caregivers are in fact independent contractors, others are misclassified as such and are, therefore, not receiving the legal protections of employee status to which they are entitled.

4) Issues specifically relating to Medicaid:

a) Rates paid by the Medicaid program, a major payer of Long-Term Services and Supports (LTSS), are inadequate to provide decent wages or job benefits for the direct care workforce.

b) Medicaid Managed-Care Organizations (MCOs) may not be reimbursing provider agencies (or provider agencies are unaware of the MCOs' processes) for travel time incurred by workers who travel during the course of their workday, even though agencies are legally required to pay workers for this time.

c) Care coordinators working for the MCOs often lack adequate knowledge of the needs of seniors and persons with disabilities who rely on LTSS, especially issues of cognitive and behavioral health, and of the systems and resources available to provide those services.¹⁶

d) Cutbacks in the number of hours of service approved for care recipients occur repeatedly for some, and result in inadequate services to meet those individual needs, a situation that pressures caregivers to work additional hours without pay.

5) Electronic Visit Verification (EVV) is the electronic system intended to verify service delivery through telephone-based or on-line check-in. Under EVV, workers are required to check in and out electronically at the beginning and end of their shift, verifying tasks performed and location.

Although EVV is a Medicaid issue, it was the subject of so many comments and concerns raised at listening sessions and by Task Force members that we are breaking it out here. The EVV system required by the Human Services Department is problematic in a number of ways, adding to stress on care recipients, direct care workers and provider agencies, and leading to nonpayment for some of the services provided by workers. The burdens and difficulties

¹⁵ Comments from the listening sessions indicated that it is not uncommon that a worker may find herself in a position where she works a couple of hours through Medicaid, stays on for a few more hours paid by the individual recipient or family, and then is called on to stay on for additional hours of work for which she is not paid.

¹⁶ In the Centennial Care 2.0 program beginning January 1, 2019, the Human Services Department intends to promote delegation of the care coordination function to providers, which may help to address this problem, at least in part.





associated with EVV were raised at every listening session, in every location visited by the Task Force.

a) The technology currently used for EVV is not up to the task of accurately recording data to be used as the basis for payment for these services. The tablets issued for use with EVV malfunction and, especially in rural areas, phone and internet connections are unreliable and often unavailable.¹⁷ When data cannot be recorded, the MCOs may refuse payment for services, with the result that either the worker is not paid or the provider agency absorbs the cost.

b) Although federal law relating to EVV specifically directs states to ensure that caregivers providing Medicaid home care services “are provided the opportunity for training on the use of such system,”¹⁸ New Mexico’s Medicaid program does not adequately reimburse providers for time spent training staff (both caregivers and agency administrative staff) on the EVV system.

c) Many care workers have limited English and/or technological skills, making use of EVV systems even more challenging.

d) In addition to the burden on workers and care recipients, provider agency staff spend considerable amounts of time correcting errors by workers or caused by factors beyond their control, such as weather or unreliable internet connections. Some agencies have had to hire additional staff just to implement and oversee EVV implementation and ongoing reporting.

e) Because caregivers are required to clock in and out through the EVV system at the start and end of their shift, they must return to the care recipient’s home even if that is not the desire of the care recipient. This infringes on the independence of the care recipient whose ability to move freely in the community is curtailed. The issue also cuts into service hours if a portion of the worker’s time must be used to travel unnecessarily to the person’s home to clock in or out.

In the 21st Century Cures Act enacted in 2016, Congress instituted a requirement that state Medicaid programs must implement EVV or be penalized through a reduction in federal matching funds. However, recognizing the many problems with EVV and that reliable EVV systems are not yet in place, Congress amended that provision earlier this year to delay the requirement. That federal action provides New Mexico and other states an opportunity to revisit EVV and ensure a properly functioning system before requiring EVV in Medicaid programs. Unfortunately, HSD has not chosen to take advantage of this opportunity and has

¹⁷ As one Task Force member summarized input received at the listening sessions in Farmington, “When it rains in Gallup, no one gets paid.” Even when communications service is available, caregivers may have to go to extraordinary lengths to use it: some caregivers reported that in order to get a signal, they have to climb up on consumers’ roofs to report in!

¹⁸ 42 USC §1396b(l)(2)(C).





already proposed regulations to make payment for Medicaid LTSS contingent on EVV reporting.¹⁹

6) Training and certification

a) Caregivers may not be receiving adequate training to enable them to do the best job possible. Better training promotes provision of good-quality services and makes workers more comfortable doing their jobs, which reduces turnover.

b) Caregivers need general training to refresh and/or improve their skills and keep them up to date--as with any line of work. Caregivers need training specific to the needs of the particular care recipient or family member for whom they provide services. Training is needed not only to help caregivers provide services that meet the physical needs of recipients, but to address the behavioral and cognitive health needs presented by many care recipients.

c) Training must be easy to access (often not the case in rural areas), offered on a schedule that fits caregivers who may work long and irregular hours, and it must be affordable for workers who earn low wages in cases where an employer does not pay for training.

d) A standardized certification system that recognizes the level of skills possessed by a caregiver and allows her/him to demonstrate increased or improved skills would help provider agencies, individuals and families hiring caregivers identify trained workers. Such a system would also help caregivers know that a career path exists that allows her/him to advance within their profession.

e) Individuals and families who hire workers need a way to identify qualified, trained workers. Provider agencies need a way to identify and hire qualified, trained workers. Certification, and subsequent publication of these individuals, can help in this regard.

f) Care should be taken to ensure that any certification requirements do not stand in the way of individuals hiring the workers they choose, or create unnecessary barriers to becoming a caregiver.

7) Issues of family caregivers

a) Individuals caring for a loved one without pay need training to enable them to provide appropriate services and to feel confident in their ability to do so.

b) Family caregivers repeatedly expressed a need for help in navigating the complicated landscape of long-term services and supports so they can get information and find services for

¹⁹ See Human Services Register, vol. 41, #23, available on the HSD website: hsd.state.nm.us/LookingForInformation/registers.aspx.





their loved ones and get the support they themselves need to take on or continue in their caregiving role.

c) Unpaid family caregivers want support groups to help them in deal with responsibilities and challenges in carrying out their role as caregiver.

Recommendations to LHHS Committee

1. HSD should delay mandatory requirements of EVV until a reliable system can be put in place that addresses stakeholder concerns and allows for reporting that is not unduly burdensome on consumers, direct care workers or provider agencies. Any EVV system implemented by the state should be informed by a robust stakeholder involvement process (as called for in the recently enacted federal law²⁰) to ensure that HSD is aware of and meaningfully addresses problems. Implementation should also include adequate training for workers as required by federal law; this should include pay for time spent training. Due to the delayed, but still looming federal deadline, this issue should be promptly addressed.
2. To improve working conditions for direct care workers and promote a thriving workforce to meet growing needs, worker pay must be increased. The Task Force recommends that reimbursement rates for direct care services in the Medicaid program be increased, with a requirement that a stated portion of the increase be passed on to workers in the form of increased wages.²¹ See also Phase 1 Report.
3. Ensure that workers are treated fairly and that caregivers receive the pay they are entitled to under the FLSA through the following actions.
 - a. Amend New Mexico statute that deprives direct care workers of state protection and remedies; bring state law into line with current employment law; provide for equal treatment of home care workers.
 - b. Improve oversight by Human Services Department for Medicaid programs and by the Department of Workforce Solutions, of MCOs, provider agencies and other employers to ensure the parties are complying with the law.
 - c. Enforce federal law to properly classify caregivers as employees so caregivers receive the legal benefits associated with that status.
 - d. Establish an ombudsman program to resolve issues regarding labor practices affecting direct care workers. The ombudsman would be a place that workers could go to get help

²⁰ 42 USC §1396b(l)(2)(A) & (B).

²¹ Legislation passed in other states, including Connecticut, Maine and Rhode Island, provides models the Legislature can look to in this regard. See PHI, *State Wage Pass-Through Legislation* (4/2003), <https://phinational.org/resource/state-wage-pass-through-legislation-an-analysis/>.





resolving grievances, and could take on a proactive role to help the state and provider agencies employing caregivers to resolve issues without litigation. See also Phase 1 Report.

4. Improve training for direct care workers
 - a. Training should be available to direct care workers both in foundational skills and in more advanced matters to promote skills improvement. This will improve the services provided to care recipients, support job advancement for workers and will reduce turnover in the industry.
 - b. Ensure that workers are properly recognized and compensated for increased skills through higher pay and improved job opportunities.
 - c. Exploit the multiple sources available for high-quality training of caregivers. Community colleges offer home health aide, medical assisting and Certified Nursing Assistant training. New Mexico Direct Caregivers Coalition's "Customized Training for Caregivers" meets requirements of the New Mexico Administrative Code for home care facilities and services. Not only does training better ensure that quality care is delivered to persons who are elderly and those with disabilities. It also serves to recognize and support caregivers, honoring the knowledge and skills they already have.
 - d. To make training broadly accessible to workers, it should be available in languages other than English, in both urban and rural areas, to individuals with low levels of technological literacy, and through means and schedules that recognize the many burdens on the time of caregivers who often work multiple jobs while also caring for their own families.
5. Explore creation of a voluntary tiered certification system to recognize the skills caregivers acquire and to help agencies and service recipients/families identify qualified, trained caregivers.

The Task Force cautions that care should be taken to ensure that certification does not serve as a barrier to entry for otherwise qualified workers. For example, a consumer in a self-directed program may wish to hire a family member to provide services, and that worker may choose to provide paid services for that person without generally offering services as a paid caregiver. This is permitted in Medicaid programs and the option should not be stymied by overbroad certification requirements. In addition, certification requirements may unintentionally be a barrier to persons with disabilities getting caregiving jobs. Any certification system put in place should avoid this undesirable outcome.

The Task Force, therefore, recommends that certification be voluntary rather than mandatory, used as a way to offer information and recognize skills acquisition, and not as a strict prerequisite to the ability to work as a caregiver. The Task Force also recommends that pay scales recognize acquisition of additional competencies through higher pay.





6. Develop additional ways to support family caregivers. The majority of caregiving is still done by family members who provide these services without pay and despite the often very high financial and emotional burdens of doing so. Family caregivers commonly must reduce their work hours or even give up their jobs to care for a loved one, reducing family income at the very time that expenses often increase in association with a loved one's needs. Beyond the financial aspects of caregiving, most of us have cared for family members who are aging and have chronic illnesses or disabilities, and are familiar with the emotional stress it entails. To help alleviate these stresses, the Task Force recommends:
- a. Reviewing other states' initiatives that set aside funding to pay for qualified family members to provide care for that care recipient as one strategy of dealing with the coming future demand for caregivers in New Mexico and the nation.
 - b. Establish a program to help unpaid family caregivers navigate the system and to obtain supports and services for themselves and their loved one, whether through Medicaid or other programs. This could be one of the roles the ombudsman's office plays. See Recommendation 3. d. While Aging and Disability Resource Center (ADRC) currently assists seniors and those with disabilities in navigating systems for care recipients, organizations that reduce stress and financial burden of caregivers should be expanded, strengthened and designed to help caregivers better manage their role.
 - c. Promote access to support groups that can inform family caregivers and reduce stress that interferes with their ability to perform the caregiving role.



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