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March 25, 2020

The Honorable Eugene Scalia Secretary
U.S. Department of Labor 200 Constitution Ave, N.W
Washington, D.C. 20210

Re: Families First Coronavirus Response Act—Definition of “Health Care Provider”

Dear Secretary Scalia:

On March 18, paid sick leave requirements were signed into law as part of H.R. 6201, the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act as included in the Families First Coronavirus Response Act. The New York State Association of Health Care Providers (NYSHCP) would like to provide the following comments regarding the Department’s development of regulations and guidance on the application of the exclusion of employees that qualify as a “health care provider.”

NYSHCP is a leading Home Care association in New York State representing Licensed Home Care Services Agencies (LHCSAs), Certified Home Health Agencies (CHHAs), and Fiscal Intermediaries (FIs) in the Consumer Directed Personal Assistance Program (CDPAP).

Home health care encompasses a wide array of health and supportive services delivered at home. Clients cross the spectrum of care—from seniors who need assistance with activities of daily living to remain in their homes; to new mothers, discharged quickly following childbirth with a few postpartum nursing visits for mom and newborn; to postsurgical patients needing assistance with wound care; to the chronically-ill who are maintained with skilled supervision, support services, home modification and equipment.

Home care agencies employ the individuals who provide skilled clinical treatments, such as the services of a registered nurse or physical therapist, or for administration of in-home glucose monitoring or intravenous therapies, as well as those that provide the supportive services designed to bolster the post-acute, chronically-ill, disabled and elderly populations that home care providers serve.

For such patients, homemaking, personal care for nutrition and hygiene, and adaptive devices to prevent slips and falls are as important to their rehabilitation and functioning as the more sophisticated health technologies that are also delivered at home. Both in-home clinical care and support services are cost-effective, often preventing emergency or urgent care events and/or hospital readmission, reducing the number of days spent in a hospital, and preventing or delaying institutionalization in a nursing home.

New York's Medicaid home care programs provide this wide range of services to hundreds of thousands of homebound sick and elderly patients throughout the State, while nearly 180,000 New Yorkers receive home care funded by the Federal Medicare Program.

As I write this letter, New York State has more than 21,689 coronavirus cases and 157 deaths. New York City alone has 13,119 cases. At least 2,213 of those patients are hospitalized and 525 are in the intensive care unit. As this crisis unfolds home health care providers will be a critical component of New York's response to this pandemic. As institutional providers prepare for a surge in COVID patients, the home care industry will be relied on as a resource for those providers to decompress and make room for those that are in crucial need of care.

As well-intended as the Families First Coronavirus Response Act is, as it stands, the definition of "health care provider" falls far short of recognizing these essential health care providers. Without that recognition, home health care providers will struggle to survive this crisis.

If these crucial caregivers are unavailable to provide care, over 12 million individuals across the country receiving health care from them will be put in jeopardy. These essential caregivers are serving those afflicted with Covid-19 as well as millions more who have unrelated care needs while also at risk of contracting Covid-19.

The current provisions in the Family Medical Leave Act rules defining a "health care provider" fall far short of recognizing the wide array of health care that is provided in a patient's home including home health services, private duty nursing, personal care attendant services, and home and community-based care. These health services are provided by nurses, therapists, home health aides, home care aides, and homemakers. 42 CFR 440.70; 440.80; 440.167; 440.180; and 440.181, respectively. Overall, Medicaid is a program that provides "medical assistance" through these health care employees, 42 CFR 440.1.

NYSHCP respectfully recommends that the Department revise its rules and include those individuals providing home care and hospice to be considered as "health care providers." This recommendation is in sync with all federal programs that fund health care services. Medicare, Medicaid, and the Department of Veterans Affairs all provide for coverage of various home care and hospice services that include the full range of caregivers in home care and hospice.

That standard is and should not be limited by the source of payment. That source of payment is fully irrelevant to a categorization of the individuals as persons employed as a "health care provider." These individuals are employed by health care entities that receive payment from government-based programs, commercial insurers, managed care plans, and private paying clientele. The source of payment may change, but the essence of their work remains health care.

In addition, the Department of Labor has long categorized these workers as health care employees in its Bureau of Labor Statistics (BLS) data. For example, 31-1011 Home Health Aides: Provide routine individualized healthcare such as changing bandages and dressing wounds, and applying topical medications to the elderly, convalescents, or persons with disabilities at the patient's home or in a care facility. Monitor or report changes in health status. May also provide personal care such as bathing, dressing, and grooming of patient.

For anyone who has experienced care in the home, it is readily apparent all of the workers are essential. It also clear that those workers are providing care essential to the health of the individual under their care. At the same time, it is readily apparent that the federal health care system recognizes all the disciplines of caregiver discussed as providing health care.

NYSHCP recommends that the following employees be excluded from the definition of “eligible employees” as they are all a “health care provider.”

Any employee of an entity who provides health care services in the place of residence of an individual including, but not limited to *nurses, physical therapists, speech-language pathologists, occupational therapists, therapy assistants, medical social workers, home health aides, home care aides, homemaker-home health aides, personal care attendants, hospice chaplains, home medical equipment technicians, pharmacists, and individuals providing administrative and management supports to direct care employees.*

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kathy Febraio". The signature is fluid and cursive, with a horizontal line extending from the end.

Kathy Febraio, CAE
President/CEO