



October 2020

FAIR LABOR STANDARDS ACT

Observations on the Effects of the Home Care Rule

Accessible Version

GAO Highlights

Highlights of [GAO-21-72](#), a report to congressional requesters

Why GAO Did This Study

Employment in home care is projected to grow nearly 40 percent over the next decade to meet demand from an increasing population of older adults and people with disabilities. Home care workers help those who need assistance with activities of daily living such as dressing, eating, or bathing. State Medicaid programs may allow home care for eligible individuals as an alternative to institutional care. The Department of Labor's (DOL) Home Care Rule, which went into effect in 2015, extended FLSA protections to more home care workers. GAO was asked to review the implementation and effects of the Home Care Rule.

This report examines what is known about (1) changes states made to their Medicaid programs in response to the Home Care Rule; and (2) the Home Care Rule's effect on home care provider agencies, workers, and consumers. To address these objectives, GAO analyzed 2010 through 2019 national survey data on workers' hours and wages; interviewed stakeholders from 15 organizations that represent the different groups affected, DOL officials, and home care program officials from three states selected based on variation in their Medicaid programs and minimum wage levels; and reviewed studies on state strategies to implement the Home Care Rule.

View [GAO-21-72](#). For more information, contact Melissa Emrey-Arras at (617) 788-0534 or emreyarrasm@gao.gov.

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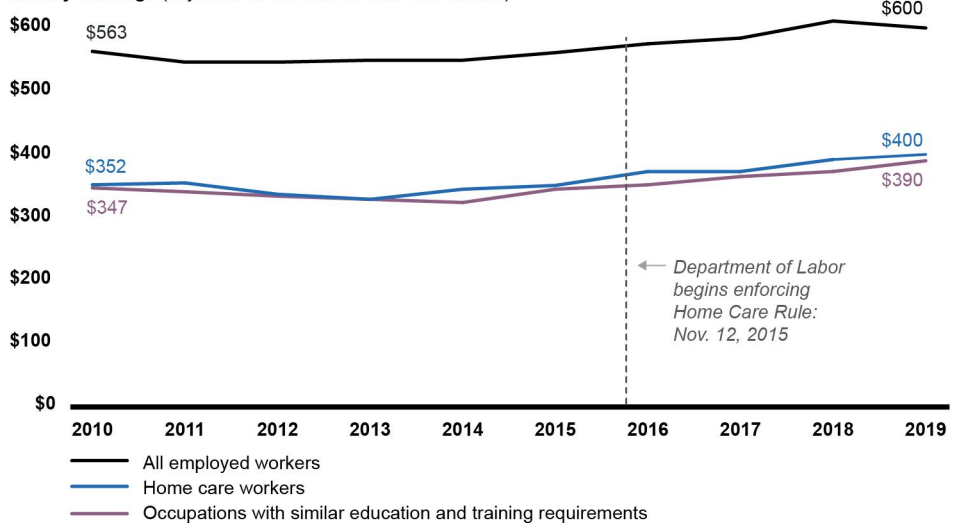
What GAO Found

In response to the Department of Labor's Home Care Rule—which extended Fair Labor Standards Act (FLSA) minimum wage and overtime protections to more home care workers—some states made changes in their Medicaid programs, according to studies and GAO interviews with stakeholders and selected state officials. Many stakeholders said the rule led some states to limit home care workers' hours in their Medicaid programs to avoid overtime costs. For example, in Oregon, newly hired home care workers provided through Medicaid were generally limited to 40 hours per week, according to state documentation. Some states also budgeted additional funds for overtime pay. In addition, according to a few stakeholder groups, some states changed service delivery in their Medicaid programs, for example, by discontinuing services such as live-in care. In contrast, several stakeholders said some states did not make any major changes to their Medicaid programs' home care services.

Provider agencies, workers, and consumers experienced changes after the Home Care Rule took effect. Specifically, some provider agencies restricted workers' hours to limit overtime costs, though this can result in the need to hire more workers, leading to increased costs of recruiting, training, and scheduling, according to several stakeholders. GAO's analysis of national survey data found that home care workers, when compared to occupations with similar education and training requirements, were more likely to work full-time but did not earn significantly higher earnings following the Home Care Rule (see figure). Many stakeholders GAO spoke with described ongoing challenges consumers face in obtaining home care services, such as difficulty finding workers to hire.

Estimated Median Weekly Earnings of Employed Workers, 2010 through 2019

Weekly earnings (adjusted for inflation to 2019 U.S. dollars)



Source: GAO analysis of 2010-2019 Current Population Survey basic monthly data. | GAO-21-72

Note: The margins of error at the 95 percent confidence level are within plus or minus 7.2 percent of the estimate itself.

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Abbreviations

ACS	American Community Survey
ASPE	Office of the Assistant Secretary for Planning and Evaluation
BLS	Bureau of Labor Statistics
COVID-19	Coronavirus Disease 2019
CPS	Current Population Survey
DOL	Department of Labor
FLSA	Fair Labor Standards Act of 1938, as amended
HCBS	home and community-based services
HHS	Department of Health and Human Services
NAICS	North American Industry Classification System
SOC	Standard Occupational Classification
WHISARD	Wage and Hour Investigative Support and Reporting Database

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October 19, 2020

The Honorable Virginia Foxx
Republican Leader
Committee on Education and Labor
House of Representatives

The Honorable Bradley Byrne
Republican Leader
Subcommittee on Workforce Protections
Committee on Education and Labor
House of Representatives

The Honorable Tim Walberg
Republican Leader
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
House of Representatives

In 2018, the home care industry in the United States employed over 3 million workers, including personal care and home health aides.¹ These home care workers help people who need assistance with activities of daily living, such as dressing, grooming, eating, or bathing. They also perform instrumental activities of daily living, including meal preparation, driving, housework, managing finances, and assisting with medications. In addition, home care is among the nation's fastest growing industries, projected to grow nearly 40 percent over the next decade to meet the demand for services from an increasing population of older adults and people with disabilities who receive care at home. State Medicaid programs may provide for home and community-based services for eligible individuals as an alternative to institutional care. Home care

¹Department of Labor, Bureau of Labor Statistics, "Home Health Aides and Personal Care Aides," *Occupational Outlook Handbook*, accessed March 2, 2020, <https://www.bls.gov/ooh/healthcare/home-health-aides-and-personal-care-aides-htm>.

allows a consumer to maintain his or her independence and may also be less costly than living in a nursing facility.²

In 2013, the Department of Labor (DOL) issued a final rule, referred to in this report as the Home Care Rule, revising its regulations on domestic service employment and companionship services under the Fair Labor Standards Act of 1938, as amended (FLSA).³ The Home Care Rule extended FLSA minimum wage and overtime protections to more home care workers. In 2014, we reported that key stakeholders had differing perspectives on the potential impact of the Home Care Rule.⁴ More recently, the Coronavirus Disease 2019 (COVID-19) pandemic has also affected home care workers and the consumers of their services.

You asked us to assess the implementation and effects of the Home Care Rule, providing an update to our prior work with available pertinent data. This report examines what is known about (1) changes states made to their Medicaid programs in response to the Home Care Rule, and (2) the Home Care Rule's effect on home care provider agencies, workers, and consumers.

To address both objectives, we conducted semi-structured interviews with stakeholders from 15 national organizations, as follows: three consumer advocacy groups, three labor organizations, four home care provider agency organizations, three state agency associations, and two research groups. These organizations were chosen because they met one or more of the following criteria: (1) represented groups affected by the Home Care Rule, (2) performed research on the effect(s) of the rule, and (3) were either included in our prior report or recommended by other experts. Additionally, we spoke with officials who administer Medicaid home care programs from three states—Illinois, Kentucky, and Oregon. The states were selected based on variation in characteristics such as state minimum wage level, overall Medicaid enrollment, home and community-

²A recent study found that the cost of in-home care for a year was approximately \$53,000, while a semi-private room in a nursing home facility cost over \$90,000 a year. Genworth, "Cost of Care Report, 2019," accessed July 1, 2020, <https://www.genworth.com/aging-and-you/finances/cost-of-care.html>.

³Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (amending 29 C.F.R. pt. 552).

⁴GAO, *Fair Labor Standards Act: Extending Protections to Home Care Workers*, [GAO-15-12](#) (Washington, D.C.: Dec. 17, 2014). At the time we published our 2014 report, the Home Care Rule had not gone into effect.

based services (HCBS) expenditures as a percentage of total Medicaid long-term services and supports spending, and the states' policy response(s) to the Home Care Rule based on information from available studies and stakeholders.⁵

For the first objective, we reviewed findings from a 2019 report by the Department of Health and Human Services' (HHS) Office of the Assistant Secretary for Planning and Evaluation (ASPE) regarding state implementation of the Home Care Rule. The ASPE report describes the types of changes made by states to their Medicaid programs in response to the rule.⁶ In addition, we reviewed surveys conducted by other stakeholder organizations and supplemented the findings with interviews of representatives from 15 national stakeholder groups.⁷ We also interviewed officials from three selected state agencies.

For the second objective, in addition to interviews with national stakeholder groups, we analyzed national survey data. Specifically, we analyzed U.S. Census Bureau Current Population Survey (CPS) basic monthly data to estimate home care workers' hours, work status, wages,

⁵Long-term services and supports financed by Medicaid are generally provided in two settings: institutional facilities, such as nursing homes and intermediate-care facilities for individuals with intellectual disabilities; and home and community settings, such as individuals' homes or assisted living facilities. Under Medicaid requirements governing the provision of services, states generally must provide institutional care to Medicaid beneficiaries, while HCBS coverage is generally an optional service. Home care workers provide the majority of paid HCBS.

⁶ASPE released a report in December 2019 on state implementation of the Home Care Rule. The report covers 75 consumer-directed Medicaid programs across all states and D.C. The report discussed various types of state policies, including workweek hour limits and exceptions policies. See Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Analysis of State Efforts to Comply with Fair Labor Standards Act Protections to Home Care Workers* (Washington, D.C.: December 2019).

⁷We used the following terms to summarize the general prevalence of themes from our interviews with national stakeholder groups: "a few" represents 3-5 groups; "several" represents 6-8 groups; "many" represents 9-11 groups; and "most" represents 12 or more groups.

and weekly earnings from 2010 through 2019.⁸ Additionally, we examined whether trends in wages and hours before and after implementation of the Home Care Rule differed significantly for home care workers compared to occupations with similar entry requirements.⁹ We also analyzed U.S. Census Bureau American Community Survey (ACS) data from 2009 through 2018 to determine the proportion of individuals living at home who reported difficulty with self-care or independent living versus those in an institutional setting. For more information on our methodology, see appendix I.

Additionally, we spoke with DOL officials regarding the department's Home Care Rule guidance and enforcement efforts. We also analyzed DOL data on the number of FLSA compliance actions DOL conducted and violations it found in the home care industry for fiscal years 2014 through 2019. Appendix II provides additional information on DOL guidance on and enforcement of the Home Care Rule. We assessed the reliability of these datasets by reviewing methodological documentation and interviewing knowledgeable officials. We found these datasets to be sufficiently reliable for our reporting objectives.

We conducted this performance audit from April 2019 to October 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit work to obtain sufficient, appropriate evidence to provide a reasonable basis for

⁸For this report, we defined home care workers as workers in either of two occupations defined by the Standard Occupational Classification (SOC) system: home health aides and personal care aides. CPS uses the Census industry and classification system, which is derived from the SOC and North American Industry Classification System but is generally less detailed. In the CPS, home health aides are classified under the group of "nursing, psychiatric, and home health aides." To help isolate home care workers within the occupational grouping, we identified workers specifically in the industries of Home Health Care, Private Households, and Individual and Family Services. These definitions may not directly overlap with the population covered by the Home Care Rule, but we believe they are a reasonable approximation.

⁹Eight occupations with similar entry requirements were selected based on a prior DOL analysis that used May 2015 data from the Bureau of Labor Statistics Occupational Employment Statistics Program. The occupations were food preparation workers; combined food preparation and serving workers, including fast food; waiters and waitresses; janitors and cleaners, except maids and housekeeping cleaners; maids and housekeeping cleaners; cashiers; retail salespersons; and stock clerks and order fillers. The home care and other occupations with similar entry requirements all required no formal educational credential for entry, required only short-term on the job training, had median pay in 2015 less than \$25,000, and were projected to see at least 50,000 new jobs over a 10-year period.

our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The FLSA is the primary federal statute that establishes standards for minimum wage, overtime pay, and child labor.¹⁰ The FLSA generally requires that covered workers be paid at least the federal minimum wage—currently \$7.25 per hour—and overtime pay at a rate of at least one and one-half times their regular rate of pay for hours worked over 40 in a workweek. In 2013, the Department of Labor issued the Home Care Rule, revising its FLSA regulations on domestic service employment to extend these minimum wage and overtime protections to more home care workers.¹¹ As discussed in more detail below, the rule also prohibited third-party employers, such as home care provider agencies, from claiming certain exemptions to the minimum wage and overtime requirements, and revised recordkeeping requirements for employers of live-in domestic service workers. As a result of these changes, more home care workers are entitled to protections under the FLSA, including federal minimum wage and overtime pay. Home care workers covered by federal minimum wage and overtime protections may also be entitled to compensation for time spent traveling between clients' homes, among other things.¹²

Home and Community-Based Services and Medicaid

According to national health expenditure data, the majority of home care services are paid for by public programs such as Medicaid, which is a federal-state health financing program for certain low-income and

¹⁰29 U.S.C. §§ 201-219.

¹¹In the final rule, DOL estimated that the Home Care Rule might affect 1.9 million home care workers, though it stated that some were already covered by minimum wage and overtime provisions at the state level. DOL also estimated that about 1.3 million of these workers did not have overtime coverage prior to the rule.

¹²Whether a particular worker may be entitled to pay for these hours depends on the circumstances. DOL has issued regulations on the compensability of travel time, which were unchanged by the Home Care Rule. See 29 C.F.R. §§ 785.33-785.41.

medically needy individuals.¹³ States have flexibility to design their Medicaid programs within federal requirements, including eligibility, services, administration, and provider compensation. The Medicaid program requires states to cover home care services in certain circumstances. States may also elect to cover home and community-based services (HCBS) under their Medicaid plans or through waivers.¹⁴ HCBS includes home health services, personal care services, and services and support for individuals—including seniors, people with disabilities, and people with chronic illnesses—who would otherwise require institutional care.¹⁵ When providing services to individuals with disabilities, states also have an obligation to provide services in the most integrated setting appropriate to their needs, consistent with the Americans with Disabilities Act.¹⁶

Delivery of Home Care

Home care services can be delivered in a variety of ways. The following information provides some examples of different service delivery methods and is not meant to be comprehensive. For example, in Medicaid under an agency-directed model, a provider employs home care workers. The provider agency hires, fires, pays, and trains the workers to provide services to Medicaid beneficiaries. Under a consumer-directed Medicaid

¹³Additional data on trends in National Health Expenditure Data can be found at: Centers for Medicare and Medicaid Services, *National Health Expenditure, Table 14*, (Baltimore, MD, November, 2019), accessed July 9, 2020, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical>.

¹⁴For example, under section 1915(c) of the Social Security Act, states may seek approval from the Centers for Medicare and Medicaid Services for waivers that allow states to provide a broad range of home and community-based services. Under these section 1915(c) waivers, states may cover personal care and other types of services that allow individuals to remain in their homes as an alternative to institutional care. See 42 U.S.C. § 1396n(c).

¹⁵The remainder of this report focuses specifically on home care services, which are one type of home and community-based service.

¹⁶The Supreme Court has held that states must serve individuals with disabilities in community-based settings under certain circumstances. *Olmstead v. L.C.*, 527 U.S. 581 (1999). Accordingly, states must ensure that in serving their Medicaid populations, they are compliant with this mandate as well as with Title II of the Americans with Disabilities Act and implementing regulations issued by the Department of Justice, which prohibit discrimination on the basis of disability by public entities. See 42 U.S.C. § 12131 *et seq.*, 28 C.F.R. pt. 35.

model, beneficiaries or their representatives have more choice and control over the services the beneficiary receives and have the authority to manage services by selecting, hiring, firing, and training workers themselves.¹⁷ States have broad legal authority over specific design features of their consumer-directed programs, and some permissible design choices include whether to offer program participants employer authority only or flexible budget authority.¹⁸ In Medicaid consumer-directed models, a written service plan specifies the services and supports to be furnished to meet the preferences, choices, abilities, and needs of the consumer. In addition, a budget plan is individually tailored in accordance with the consumer's needs and preferences as established in the service plan. State Medicaid programs can implement hybrid forms of these models as well; for example, by using a worker from a provider agency but allowing the consumer to be involved in directly managing the worker by doing such things as scheduling services, providing training on the consumer's specific needs, and, if needed, discharging the worker.

Outside of Medicaid programs, consumers can use their own funds to directly hire home care workers or engage a home care provider agency for services. Depending on the circumstances, a home care worker may have multiple employers—for example, both the state Medicaid agency and the consumer. In such situations, employers may need to determine whether they are a “joint employer” under the FLSA and therefore

¹⁷In this report, we use the term consumers to refer to those who receive home care services, including those who are beneficiaries of Medicaid programs and receive such services.

¹⁸Under employer authority, a consumer can recruit, hire, supervise, and direct workers who furnish supports. Where there is consumer-direction under budget authority, a consumer exercises decision-making authority and management responsibility for a budget in which they can determine the acquisition of goods and services authorized in the service plan. For more information on these types of consumer-directed programs, see Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Analysis of State Efforts to Comply with Fair Labor Standards Act Protections to Home Care Workers* (Washington, D.C.: December 2019).

potentially responsible for ensuring compliance with the minimum wage and overtime requirements.¹⁹

Home Care Rule Provisions and Implementation

The FLSA exempts domestic service employees providing “companionship services” to older adults or people with disabilities in private homes from its minimum wage and overtime provisions. The FLSA also provides a more limited exemption from the overtime pay requirements for domestic service employees who reside in the household where they work (live-in domestic service workers).²⁰ Prior to the Home Care Rule, these exceptions generally included home care workers.²¹ The revisions made by the Home Care Rule narrowed the definition of companionship services and limited the types of employers that could claim exemptions from minimum wage and overtime requirements for these services. Under DOL’s FLSA regulations prior to the Home Care Rule, companionship services were defined as the provision of “fellowship, care, and protection” for a person who is elderly or has a disability. The Home Care Rule revised the definition of companionship services to limit the amount of time that a worker can spend on the provision of “care.” Specifically, a worker qualifies for the companionship services exemption only if the worker primarily provides fellowship and protection to the person and spends no more than 20 percent of his or her weekly hours assisting each consumer with activities

¹⁹Under the FLSA, an employee may have—in addition to his or her employer—one or more joint employers, additional individuals or entities who are “jointly and severally” liable with the employer for the employee’s required minimum wage and overtime pay. See 29 C.F.R. § 791.2. DOL revised its joint employment regulations in January 2020; see Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020). The regulations identified several relevant factors used to determine joint employer status, including whether the individual or entity: hires or fires the employee; supervises and controls the employee’s work schedule or conditions of employment to a substantial degree; determines the employee’s rate and method of payment; and maintains the employee’s employment records. In September 2020, a federal district court vacated key portions of this rule; the parties have 60 days to appeal the decision. *New York v. Scalia*, No. 20-cv-1689, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020).

²⁰29 U.S.C. § 213(a)(15) and (b)(21).

²¹Prior to the Home Care Rule, DOL’s FLSA regulations excluded from the companionship services exemption those services that require and are performed by trained personnel, such as a registered or practical nurse, in private homes. Similarly, the Home Care Rule excludes the performance of “medically related services,” which is determined based on whether the services typically require and are performed by trained personnel, such as registered nurses, licensed practical nurses, or certified nursing assistants.

of daily living (e.g., dressing, grooming, bathing, etc.) and instrumental activities of daily living (e.g., meal preparation, driving, light housework, etc.).²²

Under the Home Care Rule, third-party employers, such as home care provider agencies, can no longer claim an exemption from minimum wage and overtime pay requirements for home care workers who provide companionship services. Additionally, third-party employers may not claim the overtime exemption for live-in domestic service workers, including home care workers.²³ In contrast, a consumer, family, or household that employs a home care worker may still claim the live-in services exemption from overtime, or the companionship services exemption from minimum wage and overtime, if the worker meets the revised definitions in the Home Care Rule.

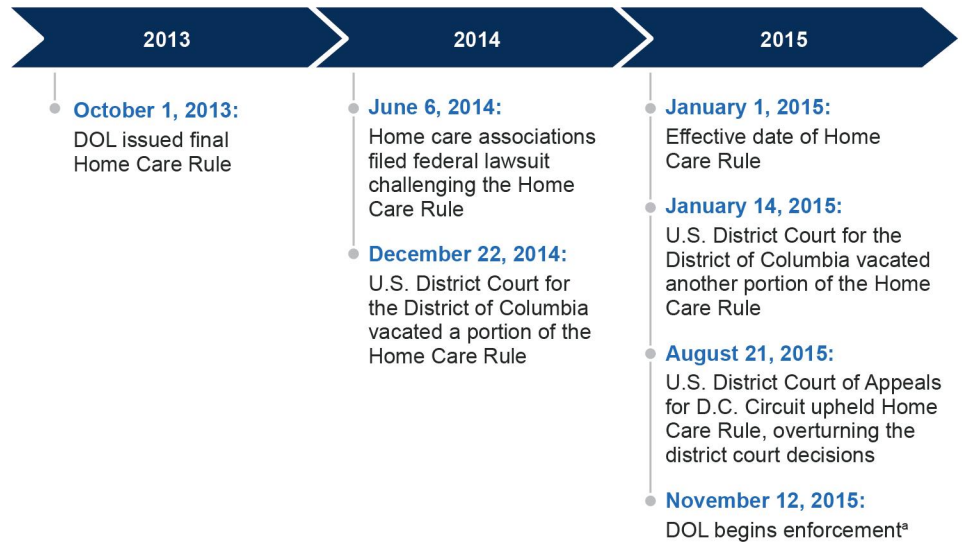
The Home Care Rule was finalized in 2013 with an effective date of January 1, 2015. However, DOL delayed enforcement of the rule, in part as a result of legal challenges to the rule. DOL began enforcing the rule's provisions in November 2015.²⁴ (See fig. 1).

²²See 78 Fed. Reg. 60,455, 60,557 (codified at 29 C.F.R. § 552.6). Fellowship includes engaging the person in social, physical, and mental activities, such as conversation, reading, games, crafts, or accompanying the person on walks, errands, or to appointments. Protection means to be present with the person in his or her home or to accompany the person when outside the home to monitor their safety and well-being.

²³See 78 Fed. Reg. 60,454, 60,557 (codified at 29 C.F.R. § 552.109(a), (c)). DOL considers workers to be live-in domestic service workers if their work qualifies as domestic service employment (services of a household nature performed in or about a private home), and they reside on their employers' premises either on a permanent basis or for extended periods of time. In addition to these changes, the Home Care Rule also required employers of live-in domestic service employees to maintain a record of the exact number of hours worked. See 78 Fed. Reg. 60,454, 60,557 (codified at 29 C.F.R. § 552.110).

²⁴On August 21, 2015, the U.S. Court of Appeals for the D.C. Circuit upheld the Home Care Rule, overturning previous lower court rulings that had vacated portions of the rule. *Home Care Ass'n of America v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015). DOL announced that it would begin enforcement of the Home Care Rule 30 days after the Court of Appeals issued a mandate directing the lower court to enter a new judgment in favor of DOL. The court issued the mandate on October 13, 2015, and DOL began enforcement on November 12, 2015. However, DOL stated that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance with the FLSA since the promulgation of the Home Care Rule. See *Application of the Fair Labor Standards Act to Domestic Service; Dates of Previously Announced 30-Day Period of Non-Enforcement*, 80 Fed. Reg. 65,646 (Oct. 27, 2015).

Figure 1: Key Dates in Implementation of Department of Labor’s (DOL) Home Care Rule Extending Federal Minimum Wage and Overtime Protections to More Home Care Workers



Source: Department of Labor (DOL) Wage and Hour Division, "U.S. Court of Appeals Unanimously Upheld DOL Rule, Opinion Effective as of Oct. 13, 2015." | GAO-21-72

^aHowever, DOL announced that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance since the promulgation of the Home Care Rule.

Before the Home Care Rule went into effect, we reported on varied stakeholder perspectives on its potential effects on employers, workers, consumers, and state Medicaid programs.²⁵ Potential beneficial effects cited by stakeholders in that report included increased wages for part-time workers, reduced worker turnover, and higher quality care as a result. Additionally, stakeholders said there could be increased opportunities for part-time workers to work additional hours. In contrast, potential negative effects cited by stakeholders were fewer hours and, consequently, reduced wages for workers who were typically employed over 40 hours a week. Other potential negative effects stakeholders cited were increased likelihood of institutionalization for consumers, as well as reduced continuity of care, access to home care services, and flexibility for consumer-directed arrangements.

²⁵GAO, *Fair Labor Standards Act: Extending Protections to Home Care Workers*, GAO-15-12 (Washington, D.C.: Dec. 17, 2014).

DOL Guidance on and Enforcement of the Home Care Rule

DOL provides guidance and technical assistance on the Home Care Rule for employers, workers, and consumers. Guidance documents, available on DOL's website, address topics such as companionship services, live-in services, shared living arrangements, and recordkeeping requirements, among others.²⁶ In addition, the DOL website includes other resources such as frequently asked questions on the Home Care Rule's provisions and a guide that helps consumers determine when they are responsible for meeting minimum wage and overtime requirements under the FLSA. DOL also provides technical assistance and outreach. One way in which DOL provides technical assistance is by responding to requests for compliance assistance from states and employers. DOL officials said that its investigations provide another opportunity to provide such assistance.

With regard to outreach, DOL has given presentations to home care associations and states on topics such as companionship services, new FLSA requirements, and how to determine hours worked. DOL officials said that feedback from stakeholders also alerts them to issues that need further clarification and guidance. For example, DOL recently issued Field Assistance Bulletin No. 2018-4 to clarify how to determine the employer status of home care and other caregiving registries—entities that match people who need caregiving services with caregivers. Specifically, the bulletin provides guidance for determining whether a registry is considered an employer of the home care workers or a matching service. For a listing of DOL guidance on the Home Care Rule, see appendix II.

DOL enforces the Home Care Rule through its process for investigating all FLSA violations. Employers are selected for investigation based on complaints and DOL criteria such as being in a high-priority industry at risk of violations. To use its resources for enforcement strategically, DOL determines priority industries and goals based on its data analysis. Investigations include examining employer records and interviewing employers and employees when appropriate. In cases where DOL finds violations, enforcement remedies include payment of back wages and liquidated damages to an employee, as applicable, and, where

²⁶Guidance specific to home care workers, whom DOL also refers to as direct care workers, can be found at <https://www.dol.gov/agencies/whd/direct-care>. Guidance documents can also be found at <https://www.dol.gov/guidance>.

appropriate, payment of civil monetary penalties to the government for repeated or willful FLSA violations.²⁷ In fiscal year 2019, there were 779 FLSA compliance actions involving the home care industry, the majority in response to complaints.²⁸ Of these compliance actions, 89 percent found an FLSA violation. About half of the compliance actions found a minimum wage violation, and similarly, about half found an overtime violation. For more information on DOL investigations and violations in the home care industry, see appendix II.

State Medicaid Program Responses to the Home Care Rule Included Limiting Workers' Hours, Funding Overtime, and Changing Service Delivery

States made a variety of changes to their Medicaid programs in response to the Home Care Rule, including restricting home care workers' hours, funding overtime, and changing the delivery of services, according to the studies we reviewed and stakeholders we interviewed.²⁹ On December 15, 2014, prior to the Home Care Rule's effective date, the Department of Justice and HHS highlighted some states' planned implementation strategies in a Dear Colleague Letter.³⁰ For example, according to the letter, some states planned to limit worker hours in response to budget constraints, while others developed budget proposals to account for

²⁷See 29 U.S.C. § 216.

²⁸Compliance actions include the following investigative tools: conciliations, full investigations, limited investigations, office audits, and self-audits.

²⁹In addition to HHS ASPE's study, two organizations surveyed state agencies or programs about their strategies to implement the Home Care Rule. An association representing directors for state agencies on aging, disability services, and long-term services and supports included a question about strategies to implement the Home Care Rule in its 2017 survey. See National Association of States United for Aging and Disabilities, *State of the States in Aging and Disability: 2017 Survey of State Agencies* (Washington, D.C.: 2017). The Kaiser Family Foundation also conducts an annual survey of HCBS waiver programs in which it asked about state policies related to the Home Care Rule in fiscal years 2015 to 2018. See Kaiser Family Foundation, *Key State Policy Choices About Medicaid Home and Community-Based Services* (San Francisco, CA: February 2020) for the most recent survey results.

³⁰The Dear Colleague Letter advised states on their legal obligations when serving individuals with disabilities as they implemented the Home Care Rule.

increased overtime costs. We also previously reported in December 2014 that the Home Care Rule could potentially affect how a state structured its Medicaid home care programs.³¹ The application of the FLSA in various home care scenarios depends in part on how services are delivered and the facts and circumstances of each situation. It is difficult to comprehensively track state responses because of the multitude and variety of Medicaid programs that offer home care services, both across and within states, and based on available studies' limitations, we did not enumerate the number of states that implemented certain policies.³² Nevertheless, available studies, stakeholder perspectives, and examples from three selected states offer insights into the range of state responses to the Home Care Rule.

Restricting Worker Hours

Selected State Perspectives

In Oregon, Medicaid-provided home care workers are subject to hour limitations, according to a state agency official. Home care workers hired on or after June 1, 2016, generally have their weekly hours capped at 40, according to a collective bargaining agreement covering 2015-2019. The agreement also provides that home care workers who were hired prior to that date are generally capped at 50 hours per week. A state agency official said these restrictions were a direct response to the Home Care Rule, and the higher restriction for existing workers provided needed flexibility.

This official said there are exceptions to the weekly cap on hours for home care workers, including cases in which consumers are unable to find another worker, or in an emergency situation where a worker cannot be immediately relieved of duty.

Source: GAO interview with a state official. | GAO-21-72

Many stakeholders said that some states restricted home care workers' hours to limit overtime costs in their Medicaid programs in response to the Home Care Rule. The type of hour restrictions varied across states and programs and, in some cases, applied only to certain home care workers.

³¹GAO-15-12.

³²For example, available studies used different methodologies and we could not compare findings across studies. Further, the studies' findings only apply to a subset of programs. For more information, see appendix I.

According to an ASPE report, some states had programs with an exact 40-hour limit on weekly hours, which would not provide for any overtime hours unless an exception was available. The report also identified some state programs with a cap above 40 hours per week, and which allowed for a limited amount of overtime hours for workers.³³ Similarly, according to three surveys spanning 2016 to 2018, some state Medicaid programs reported restricting workers' hours as they implemented the Home Care Rule.³⁴ According to one stakeholder group that represented provider agencies, hour restrictions could result in consumers relying on family caregivers to cover their service needs beyond the limits imposed by hour restrictions.³⁵

In Medicaid programs where a state restricted home care workers' hours, some allowed exceptions to these limits, according to ASPE's study and a few stakeholders we interviewed. States can use exceptions to accommodate consumers who would otherwise be at an increased risk of institutionalization based on the hours limit, according to the federal Dear Colleague Letter. ASPE found that some programs had exceptions policies for consumers who need more hours of care than are allowed under the restrictions. An official from one of our selected states described implementing different hour restrictions in response to the rule, as well as for situations in which consumers could receive additional care (see sidebar).³⁶

³³These ASPE findings are based on an environmental scan of program documentation, and did not specify when these program features were implemented. ASPE officials did not interview representatives from every state, and information on state implementation of the Home Care Rule is based on inferences ASPE made from program documentation.

³⁴National Association of States United for Aging and Disabilities, *State of the States in Aging and Disability: 2017 Survey of State Agencies* (Washington, D.C.: 2017); Kaiser Family Foundation, *Medicaid Home and Community-Based Services: Results from a 50-State Survey of Enrollment, Spending, and Program Policies* (Menlo Park, CA: January 2018); Kaiser Family Foundation, *Key State Policy Choices About Medicaid Home and Community-Based Services* (San Francisco, CA: February 2020).

³⁵In some Medicaid programs, home care service consumers can select family or household members as a paid provider.

³⁶Illinois officials told us that the state also initially restricted hours in a Medicaid program to 45 per week for certain workers in response to the Home Care Rule. According to officials, the state recently finalized a new cap for this program that allows for up to 60 hours per week, but has not implemented it yet.

Providing Additional State Funding for Overtime

Selected State Perspectives

For one Medicaid home care program in Illinois, state agency officials said they incorporated anticipated overtime costs into the program's annual budget. They said the overtime costs comprise a small portion—about 4 percent—of the overall program budget.

Source: GAO interview with state officials. | GAO-21-72

According to several stakeholders we interviewed and survey findings, some states appropriated funds to account for additional costs associated with overtime in response to the Home Care Rule (see sidebar). For example, one state collected information from home care provider agencies to determine the average use of overtime and provided funding to cover those hours rather than restrict workers' hours, according to two stakeholders we interviewed. In a 2017 survey, some states reported increasing their HCBS budget to comply with the Home Care Rule, and, for the most part, the overall increase in expenditures was less than 5 percent of the state's overall spending on long-term services and supports.³⁷

Aside from overtime pay, some states also reported providing additional funding for costs associated with travel time, according to two surveys. For workers covered by the FLSA's minimum wage and overtime provisions, certain time spent traveling during the workday is considered compensable hours worked.³⁸ Thus, home care workers who are now covered by these provisions as a result of the Home Care Rule may be entitled to compensation for travel time in certain circumstances. For example, DOL's Home Care Rule guidance states that time workers spend travelling between different job sites for the same employer during

³⁷National Association of States United for Aging and Disabilities, *State of the States in Aging and Disability: 2017 Survey of State Agencies* (Washington, D.C.: 2017).

³⁸DOL has issued regulations governing compensation for travel time, which were unchanged by the Home Care Rule. See 29 C.F.R. §§ 785.33-785.41. Among other things, those regulations provide that "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked." 29 C.F.R. § 785.38.

their work day counts towards their compensable hours.³⁹ States may also provide funding for Home Care Rule implementation costs. For example, the Oregon Department of Human Services budget for fiscal years 2015 to 2017 included funding for developing an information technology system to track home care workers' hours and travel time.⁴⁰

Changing Service Delivery under State Medicaid Programs

Selected State Perspectives

An official in Oregon said that the state eliminated a Medicaid home care program that had provided for 24/7 live-in care as a result of the Home Care Rule. Specifically, the state determined that the program's structure would not work without an exemption from overtime pay because workers would have exceeded 40 hours by the second day of the week.

Source: GAO interview with a state official. | GAO-21-72

A few stakeholders said some states changed how home care was provided in their Medicaid programs as a result of the Home Care Rule. According to representatives from two stakeholder groups, some states increased consumers' control over their care. Representatives from one of these groups said states may have an incentive to increase consumer flexibility and control to potentially reduce the likelihood that the state would share responsibility with consumers for paying minimum wage and overtime under the FLSA. Representatives from another group said in some instances states redesigned service delivery models to more clearly define consumers' employer responsibilities. Examples of potential consumer employer responsibilities under these service models, according to these representatives, include determining a worker's pay and covering overtime costs within the consumer's Medicaid service budget.

³⁹See Department of Labor, Wage and Hour Division, *Fact Sheet # 79D: Hours Worked Applicable to Domestic Service Employment Under the Fair Labor Standards Act (FLSA)* (Washington, D.C.: April 2016). The guidance also notes that a worker who drives a consumer to errands during the workday must be paid for that travel time.

⁴⁰Oregon Department of Human Services, *Department of Human Services 2015-17 Legislatively Adopted Budget* (Salem, OR: 2015).

Some states implemented other restrictions or program changes, according to survey results and representatives from two other stakeholder groups.⁴¹ For example, representatives from a stakeholder group said that one state limited the number of consumers a home care worker could serve. In other cases, states discontinued certain programs, such as live-in care, in response to the Home Care Rule, according to representatives from one stakeholder group and a state official (see sidebar).

⁴¹National Association of States United for Aging and Disabilities, *State of the States in Aging and Disability: 2017 Survey of State Agencies* (Washington, D.C.: 2017) and Kaiser Family Foundation, *Key State Policy Choices About Medicaid Home and Community-Based Services* (San Francisco, CA: February 2020).

No Changes to Some State Medicaid Programs

Selected State Perspectives

Officials from a state agency in Kentucky said that the Home Care Rule did not have much of an effect on existing policies in their state's Medicaid home care programs. Before the implementation of the Home Care Rule, officials said the state already restricted hours to 40 per week for certain home care workers.

Source: GAO interview with state officials. | GAO-21-72

Representatives from several stakeholder groups said that some states did not make major changes to their Medicaid programs' home care services in response to the Home Care Rule. For example, some states may already have established hour restrictions prior to the implementation of the Home Care Rule (see sidebar). In some cases, according to representatives from two of these stakeholder groups, changes occurred primarily at the provider agency level. According to representatives from one stakeholder group, many Medicaid programs have home care services delivered by provider agencies; in such cases, they said the burden of implementing any changes in response to the Home Care Rule would fall to the provider agency, instead of the state.

Provider Agencies, Home Care Workers, and Consumers Experienced Changes Following the Home Care Rule

Some Provider Agencies Limited Workers' Overtime and Incurred Additional Administrative Costs Due to Home Care Rule

According to several stakeholders we interviewed, some provider agencies that employ home care workers also capped their workers' weekly hours to limit overtime costs as a result of the Home Care Rule. Representatives of one home care provider association said that provider agencies tend to avoid overtime hours because they have limited funding and consumers cannot afford price increases to cover those costs. Further, two stakeholder groups representing home care provider agencies said that some provider agencies discontinued programs that provided 24-hour or live-in care because they could not afford the estimated payroll costs associated with overtime. For example, one

stakeholder said that some provider agencies used to offer respite care in which a live-in caregiver would be available so that family caregivers could take a break. However, the stakeholder said that after the Home Care Rule was implemented, some agencies would be unable to offer such services, which could result in additional stress for family caregivers. According to a few stakeholder groups, hour restrictions were not necessarily a result of the Home Care Rule, as some provider agencies limited overtime prior to the rule.

A few stakeholders, including provider agency, worker, and state groups, described various administrative changes made by some home care provider agencies in response to the rule that resulted in increased operational costs. For example, the stakeholders said restricting workers' hours led to increased costs for recruitment, training, and scheduling for provider agencies, in part because additional workers had to be hired to accommodate client needs. Also, some provider agencies face additional costs associated with recordkeeping activities such as tracking a worker's overtime hours and time spent traveling between consumers' homes, according to stakeholders.

Home Care Workers Were More Likely to Work Full-Time Following the Home Care Rule, though Earnings Did Not Significantly Increase Compared to Similar Occupations

After implementation of the Home Care Rule, home care workers were more likely to work full-time than other occupations with similar entry (education and training) requirements, though they did not have significant increases in earnings compared to these occupations.⁴² Our findings were based on CPS data on hours and earnings, which we analyzed to (1) examine trends over time from 2010 to 2019, and (2) examine whether trends in hours and wages before and after implementation of the Home Care Rule differed significantly between

⁴²In our analysis, "implementation of the Home Care Rule" refers to the period beginning on January 1, 2016. DOL began enforcing the Home Care Rule on November 12, 2015. However, DOL stated that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance with the FLSA since the promulgation of the Home Care Rule. See Application of the Fair Labor Standards Act to Domestic Service; Dates of Previously Announced 30-Day Period of Non-Enforcement, 80 Fed. Reg. 65,646 (Oct. 27, 2015).

home care workers and those in occupations with similar entry requirements when controlling for certain factors.⁴³

Hours and Work Status

The average number of usual hours worked for home care workers increased from an estimated 33 hours in 2010 to 34 hours in 2019.⁴⁴ Their work status changed over this time period as well. The proportion of home care workers who reported usually working full-time was about 49 percent in 2019, an 11 percent increase from 2010.⁴⁵ In comparison, about 52 percent of workers in occupations with similar entry requirements reported usually working full-time, an increase of 6 percent from 2010. In 2019, an estimated 41 percent of home care workers reported usually working part-time, an 11 percent decrease from 2010. About the same percentage of those working in occupations with similar entry requirements worked part-time in 2019, an estimated 42 percent; this was about a 7 percent decrease from 2010. When we compared trends before and after implementation of the Home Care Rule, we found that home care workers were more likely to work full-time and less likely to work part-time than workers in occupations with similar entry requirements.

In 2019, an estimated 10 percent of home care workers reported usually working overtime, which was not a significant change from 2010.

⁴³Our analyses focused on employed workers who reported being paid at an hourly rate or said it was easier to report hourly earnings. We calculated wage and earnings data based on workers' primary job because earnings data for workers' second or other jobs were not available. We used multivariate regressions to see if trends before and after implementation of the Home Care Rule were significantly different between home care workers and those in occupations with similar entry requirements. The occupations with similar entry requirements were: food preparation workers; combined food preparation and serving workers, including fast food; waiters and waitresses; janitors and cleaners, except maids and housekeeping cleaners; maids and housekeeping cleaners; cashiers; retail salespersons; and stock clerks and order fillers. For more information on our methodology, see appendix I.

⁴⁴Unless otherwise noted, all numerical estimates from our CPS analysis in this report have margins of error at the 95 percent confidence level of plus or minus 9 percent of the value of those estimates.

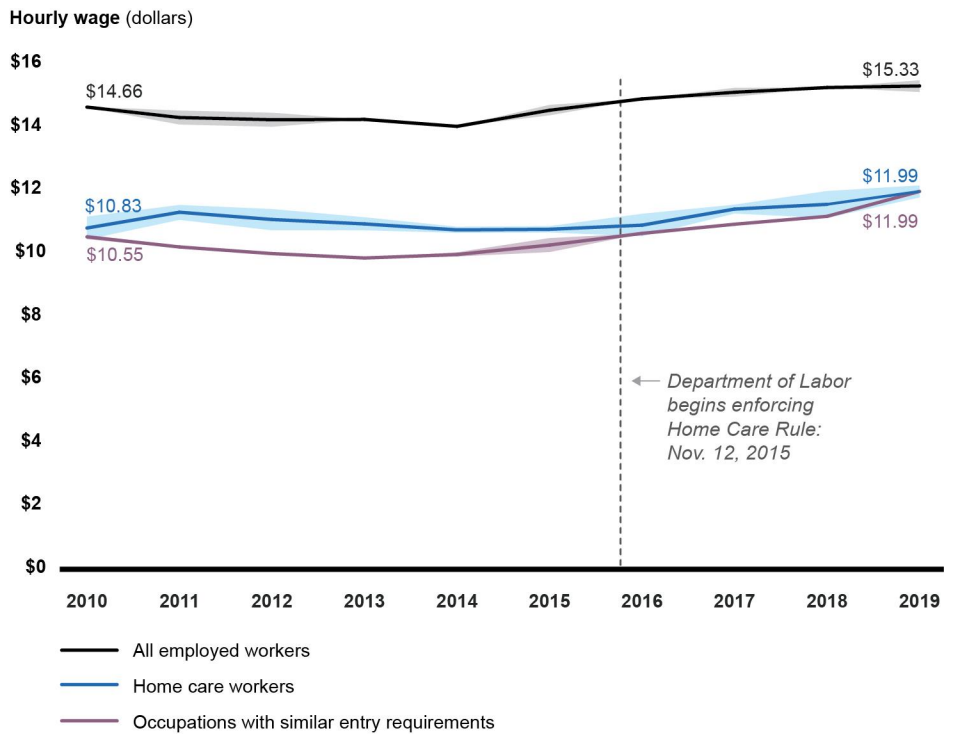
⁴⁵Based on work status definitions in CPS and overtime pay requirements in the FLSA, we defined part-time as those who reported usually working fewer than 35 hours per week; full-time as usually working between 35 and 40 hours per week; and overtime as usually working over 40 hours per week. Unless otherwise noted, all percentage estimates in this report have margins of error at the 95 percent confidence level of plus or minus 2 percentage points, and all percent change estimates have margins of error at the 95 percent confidence level of plus or minus 6 percentage points.

However, the estimated number of overtime hours worked decreased from 20 hours of overtime in 2010 to 17 hours in 2019. By comparison, in 2019, about 6 percent of workers in occupations with similar entry requirements reported usually working overtime, and the estimated number of overtime hours they worked did not significantly change from 2010. According to results from our regression analysis, home care workers were less likely to work overtime following implementation of the Home Care Rule when compared to occupations with similar entry requirements.

Wages and Weekly Earnings

Home care workers' reported hourly wage did not significantly increase following implementation of the Home Care Rule when compared to those in occupations with similar entry requirements. Adjusted for inflation, home care workers earned a median reported hourly wage of \$11.99 in 2019, an increase from \$10.83 in 2010. Wage rates for workers in occupations with similar entry requirements were similar to those of home care workers in 2019 and 2010 (see fig. 2).

Figure 2: Estimated Median Hourly Wage of Employed Workers, 2010 through 2019



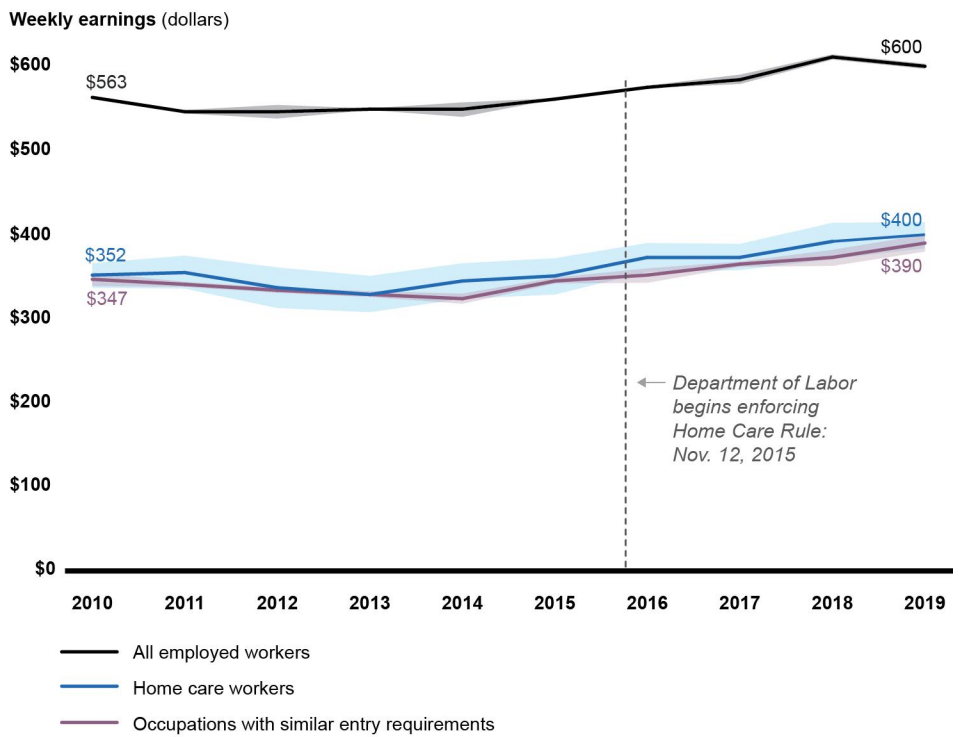
Source: GAO analysis of 2010-2019 Current Population Survey basic monthly data. | GAO-21-72

Note: GAO adjusted wage data for inflation and expressed them in 2019 U.S. dollars. GAO calculated wages among employed, hourly workers who reported positive pay for the worker's primary job. The margins of error at the 95 percent confidence level for the estimates in this figure are within plus or minus 4 percent of the estimate itself. The shaded areas represent the 95 percent confidence intervals for the wage estimates. Home care and occupations with similar entry requirements, selected on the basis of a prior Department of Labor (DOL) analysis that used 2015 data, were all characterized by the following: required no formal educational credential for entry; required only short-term on-the-job training; had median pay in 2015 of less than \$25,000; and were projected to see at least 50,000 new jobs over a 10-year period. The occupations with similar entry requirements were: food preparation workers; combined food preparation and serving workers, including fast food; waiters and waitresses; janitors and cleaners, except maids and housekeeping cleaners; maids and housekeeping cleaners; cashiers; retail salespersons; and stock clerks and order fillers. Although DOL began enforcement of the Home Care Rule on November 12, 2015, it stated that the agency would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance.

A worker's overall earnings would reflect hourly wage rates as well as hours worked. Our analysis of trends in weekly earnings of home care workers showed median weekly earnings were an estimated \$400 in

2019 compared to \$352 in 2010 (see fig. 3).⁴⁶ However, similar to hourly wages, home care workers' weekly earnings did not change significantly following implementation of the Home Care Rule compared to occupations with similar entry requirements.

Figure 3: Estimated Median Weekly Earnings of Employed Workers, 2010 through 2019



Source: GAO analysis of 2010-2019 Current Population Survey basic monthly data. | GAO-21-72

Note: GAO adjusted earnings data for inflation and expressed these data in 2019 U.S. dollars. GAO calculated weekly earnings among employed, hourly workers who reported positive pay for the worker's primary job. The margins of error at the 95 percent confidence level for the estimates in this figure are within plus or minus 7.2 percent of the estimate itself. The shaded areas represent the 95 percent confidence intervals for the weekly earnings estimates. Home care and occupations with similar entry requirements, selected on the basis of a prior Department of Labor (DOL) analysis that used 2015 data, were all characterized by the following: required no formal educational credential for entry; required only short-term on the job training; had median pay in 2015 of less than \$25,000; and were projected to see at least 50,000 new jobs over a 10-year period. The occupations with similar entry requirements were food preparation workers; combined food preparation and serving workers,

⁴⁶CPS data on earnings are available on a weekly basis. All self-employed persons whose businesses are unincorporated are excluded. Data represent reported earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received. The earnings data are collected from one-fourth of the CPS total sample of approximately 60,000 households.

including fast food; waiters and waitresses; janitors and cleaners, except maids and housekeeping cleaners; maids and housekeeping cleaners; cashiers; retail salespersons; and stock clerks and order fillers. Although DOL began enforcement of the Home Care Rule on November 12, 2015, it stated that the agency would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance.

Observed trends in the work schedules and earnings of home care workers may reflect the hour restrictions imposed by some states and provider agencies in response to the Home Care Rule. For example, part-time workers may benefit from the redistribution of hours in cases where employers manage workers' hours to avoid paying overtime, according to our prior report.⁴⁷ Additionally, several stakeholders, including labor groups, told us that home care workers may compensate for hours restrictions by working for multiple consumers or provider agencies to maintain their usual hours.⁴⁸

Stakeholders also mentioned separate or overlapping factors that affect home care workers. For example, several stakeholders said that Medicaid reimbursement rates affect the amount that provider agencies pay home care workers and can limit their ability to raise workers' wages if states do not increase these rates.⁴⁹ In addition, a few stakeholders said that provider agencies had been limiting workers' weekly hours to help control labor costs even prior to implementation of the Home Care Rule, for example in cases where a state already required overtime pay for home care workers. Further, provider agencies also made changes in response to other factors, such as by capping hours so the agencies would not be subject to the requirement to provide health insurance under the Patient Protection and Affordable Care Act (Affordable Care Act), according to two stakeholders and agency officials.⁵⁰ The recent COVID-19 pandemic

⁴⁷[GAO-15-12](#).

⁴⁸We found that an estimated 7 percent of home care workers held more than one job, but data on the occupation or industry of a worker's other jobs are not collected in a majority of cases. While the proportion of home care workers working multiple jobs did not significantly increase since 2010, home care workers work multiple jobs at a higher rate than those in occupations with similar entry requirements.

⁴⁹States establish their own Medicaid provider payment rates within federal requirements.

⁵⁰Under the Affordable Care Act, employers with at least 50 full-time equivalent employees—which includes employees whose hours average at least 30 hours per week—must offer qualifying health insurance to their full-time employees or face tax penalties if at least one employee receives subsidized coverage through an exchange. See Pub. L. No. 111-148, § 1513, 124 Stat. 119, 253-56 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1003, 124 Stat. 1029, 1033 (codified at 26 U.S.C. § 4980H.)

will also likely affect home care workers' hours and wages.⁵¹ According to several stakeholders, demand for home care services is fluctuating. In some cases, demand is decreasing because consumers are concerned about workers entering their home, or they are able to rely more on family caregivers. In other cases, demand is increasing because, for example, a consumer's family member may fall ill and be unable to provide care.

Consumers Continued to Face Challenges in Obtaining Home Care Services, According to Stakeholders

Stakeholders we interviewed described ongoing challenges for consumers in obtaining home care services, which can be exacerbated by policies some states and provider agencies adopted in response to the Home Care Rule, such as hour restrictions. Many stakeholders we interviewed said there is an ongoing worker shortage in the home care industry overall that has made it challenging for consumers to hire and retain home care services.⁵² These stakeholders said consumers directing their own care in Medicaid programs face challenges in hiring and retaining home care workers due, in part, to the inability to raise workers' wages under budgets fixed by Medicaid programs. A few stakeholders also mentioned a scarcity of home care workers available for consumers to hire, particularly in rural areas of the country.⁵³ For example, representatives from a consumer group said there is limited choice in extremely rural areas because there may not be any available providers and because travel times can be significant. Similarly, Illinois state officials said that in some rural areas of the state, there may be only one available home care worker to provide services, and a back-up

⁵¹We sent follow-up questions about how the COVID-19 pandemic has affected the home care industry to the 15 stakeholder groups we interviewed. Six organizations responded to our information request.

⁵²There is no single definition of or measure to determine a workforce shortage. GAO previously reported on potential workforce shortages in aviation. We found that no single metric provided definitive evidence of a labor shortage and that the term "shortage" can be used to describe a variety of situations. See GAO, *Aviation Workforce: Current and Future Availability of Aviation Engineering and Maintenance Professionals*, [GAO-14-237](#) (Washington, D.C.: Feb. 28, 2014).

⁵³We previously reported on state challenges in providing HCBS and found that recruiting and retaining workers and ensuring availability of HCBS providers in rural areas was among those cited by states. GAO, *Medicaid Home- and Community-Based Services: Selected States' Program Structures and Challenges Providing Services*, [GAO-18-628](#) (Washington, D.C.: Aug. 30, 2018).

caregiver may live far away.⁵⁴ The recent COVID-19 pandemic may also affect consumers' access to care. According to a few stakeholders, some consumers do not have access to the care they need because workers who would normally serve them lack needed personal protective equipment. The manner in which services are provided can also shift as a result of the pandemic, with more consumers relying on family or informal caregivers, or telehealth services.

The challenges consumers face may be exacerbated by policies states or provider agencies made in response to the Home Care Rule, such as hour restrictions. A few stakeholders, including worker and consumer advocacy groups, said that some consumers have had to hire additional workers in light of hour restrictions put in place by states or provider agencies or to avoid incurring overtime costs, making it particularly difficult to find enough workers to cover their needs. For example, a consumer group said that in such situations, friends and family may be willing to help with caregiving when a consumer cannot hire a worker, but in other cases a consumer may receive fewer services. Further, hiring multiple workers could affect continuity of consumer care. For example, an official from Oregon said that when the state eliminated its live-in program and capped workers' hours, consumers who needed care beyond the hours limit faced a reduction in continuity of care because they were now being served by multiple workers. Despite these challenges, two stakeholders said that some states made changes in their Medicaid programs in response to the Home Care Rule that provided consumers with more flexibility and control over managing their own care. In consumer-directed Medicaid programs, consumers have control over who they hire as a home care worker. Officials from Illinois said that such consumer control could have a positive effect on quality of care.⁵⁵

In addition, in our prior report on the Home Care Rule, issued before the rule took effect, stakeholders cited concerns that consumers risk being transferred from home care to an institution or alternate setting because of service cost increases. We did not find evidence of an increased prevalence of consumers living in institutional settings based on our

⁵⁴According to an Illinois state official, for consumers in such circumstances, the state would allow for an exception to its overtime hour restrictions in one Medicaid program, previously mentioned in this report.

⁵⁵In one Medicaid home care program in Illinois, over 80 percent of participants choose to receive services through a worker they directly hire, within certain limits, and have full control over who works in their home, according to an official.

analysis of American Community Survey data for this review. We found that the number of individuals reporting difficulty with self-care or independent living has grown by 8 percent from 2009 to 2018, reaching nearly 18 million people. However, among this population, the share of individuals who reported living in an institution—such as skilled nursing facility—declined by 25 percent.⁵⁶ Nevertheless, the growing population of those who need care at home may still face challenges in obtaining services due to difficulties in hiring workers.

Agency Comments

We provided a draft of this report to the Departments of Health and Human Services and Labor for review and comment. The agencies provided technical comments, which we incorporated in our report as appropriate.

We are sending copies of this report to the appropriate congressional committees and the Secretaries of the Departments of Health and Human Services and Labor, and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (617) 788-0534 or emreyarrasm@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.



Melissa Emrey-Arras, Director
Education, Workforce, and Income Security

⁵⁶For the percent change estimates from the American Community Survey data, the margins of error at the 95 percent confidence level are within plus or minus 1.1 percentage points. Medicaid HCBS programs represent the majority of total Medicaid long-term services and supports spending, growing by 33 percent from fiscal years 2008 to 2016. In the same period, the proportion of Medicaid long-term services and supports spending on institutional care declined by 25 percent. Medicaid Innovation Accelerator Program, *Medicaid Expenditures for Long-Term Services and Supports in Fiscal Year 2016*, May 2018.

Appendix I: Objectives, Scope, and Methodology

Overview

This report examines what is known about (1) changes states made to their Medicaid programs in response to the Home Care Rule; and (2) the Home Care Rule's effect on home care provider agencies, workers, and consumers. To inform both objectives, we conducted semi-structured interviews with stakeholders from 15 national-level organizations. For the first objective, we also identified themes from available studies and interviews with selected state officials. For the second objective, we also analyzed national survey data on workers and consumers.

In addition, to describe the topics covered by Department of Labor (DOL) guidance on the Home Care Rule and Fair Labor Standards Act (FLSA) enforcement activity in the home care industry, we interviewed agency officials, reviewed documentation, and analyzed enforcement data (see appendix II).

Objective 1 Sources and Methodology

Interviews

We selected 15 national stakeholder organizations that met one or more of the following criteria: (1) represented groups affected by the Home Care Rule, (2) conducted research on the effects of the rule, and (3) were either included in our prior GAO report or recommended by other experts. Accordingly, we spoke with three consumer advocacy groups, three labor organizations, four home care provider agency organizations, three state agency associations, and two research groups. Using a set of semi-structured interview questions, we asked representatives of these stakeholder groups about several topics related to the implementation and effects of the Home Care Rule, including:

- changes states made to Medicaid-funded home care programs,
- effect on home care provider agency operations,
- effect on home care workers' hours and wages, and

- effect on access to and quality of services for consumers.

To summarize these interviews, we identified commonly mentioned themes regarding how the Home Care Rule affected state Medicaid programs, home care provider agencies, home care workers, and consumers. We used the following terms to summarize the general prevalence of themes from our interviews: “a few” represents 3-5 groups; “several” represents 6-8 groups; “many” represents 9-11 groups; and “most” represents 12 or more groups.

In addition to national stakeholder groups, we interviewed officials from three selected states (Illinois, Kentucky, and Oregon) to obtain illustrative examples of policy changes in Medicaid-funded home care programs made in response to the Home Care Rule. We selected states that represent a variety of Medicaid program and workforce characteristics. Specifically, we selected states that varied in: (1) total Medicaid enrollment; (2) the proportion of long-term services and supports funds spent on home and community-based services; (3) state minimum wage level; and (4) representation of different types of policy responses.

We obtained state-level Medicaid enrollment data from the December 2018 edition of the Medicaid and CHIP data book.¹ We obtained state-level home and community-based services spending data from a report produced for the Centers for Medicare and Medicaid Services titled *Medicaid Expenditures for Long-Term Services and Supports in FY 2016*. For state minimum wage levels, we used data reported by DOL. The application of minimum wage requirements can vary based on individual state laws. We did not assess whether home care workers are covered under a state’s minimum wage requirements. Rather, we used the DOL information as a general indicator of whether a state’s minimum wage rate was equal to or above the federal minimum wage level. To determine what types of policies states may have in place, we reviewed the results and underlying data from available studies that collected data on state implementation of the Home Care Rule, as well as policy briefs compiled by the National Employment Law Project. Representatives from stakeholder groups we interviewed also provided recommendations in this area.

For each selected state, we interviewed officials from agencies that operate Medicaid programs offering home care services to beneficiaries

¹Medicaid and CHIP Payment Access Commission, *MACStats: Medicaid and CHIP Data Book* (Washington, D.C.: December 2018).

that need assistance with activities of daily living or instrumental activities of daily living. We reviewed program documentation to understand program operations, and we asked state officials about policy changes in response to the Home Care Rule for the programs under their purview. We also asked officials about the effects these policy changes had on state budgets, home care provider agencies, home care workers, and consumers. We confirmed relevant excerpts from our draft report with officials from selected states.

Studies on State Implementation of the Home Care Rule

We conducted an initial literature search and did not find any academic studies on state implementation of the Home Care Rule. Through our interviews with agency officials and representatives from stakeholder groups, we became aware of three organizations that had studied this topic:

- The Office of Disability, Aging, and Long-Term Care Policy within the Department of Health and Human Services' Assistant Secretary for Planning and Evaluation funded a study that included themes from stakeholder interviews and an environmental scan of 75 consumer-directed Medicaid programs.
- ADvancing States, an association that represents state directors of disability and aging services agencies, administers a biennial survey to agencies in 56 states and territories. The 2017 survey included a question about state strategies to implement the Home Care Rule.
- The Kaiser Family Foundation conducts an annual survey of all Medicaid Home and Community-Based Services programs. From fiscal years 2015 to 2018, the survey included questions about state policies made in response to the Home Care Rule.

We assessed the reliability of studies from these three sources by reviewing documentation and interviewing knowledgeable officials and representatives. We found these studies to be reliable for the purposes of describing a range of state responses. Based on the variation in Medicaid-funded home care program operations, both within a state and across states, and available studies' methodological limitations, we did not enumerate the number of states that implemented a certain type of policy. For example, a program may have hour restrictions in place for a certain subset of workers, but the restriction would not necessarily apply to all home care workers in the program. Similarly, in some cases it was

difficult to discern which specific policy a state implemented based on the available studies' categorization of results. For example, in some of the survey questions, multiple types of policies were included in a single response option. Additionally, each study used different methodologies, and we could not compare results across studies as a result. Finally, none of the available studies had comprehensive coverage of state Medicaid-funded home care programs, so findings apply only to a certain subset of programs.

Objective 2 Sources and Methodology

Current Population Survey

To analyze data on home care workers' hours, wages, and earnings, we used basic monthly data from the Current Population Survey (CPS) for the 2010 to 2019 time period. The CPS is sponsored jointly by the Census Bureau and U.S. Bureau of Labor Statistics (BLS) and is the primary source of labor force statistics for the United States population. The CPS is administered by the Census Bureau using a probability-selected sample of about 60,000 occupied households. Households from all 50 states and the District of Columbia are in the survey for 4 consecutive months, out for 8, and then return for another 4 months before leaving the sample permanently. In any given month, one-eighth of the housing units are interviewed for the first month. When the system has been in operation for a full year, four of the eight rotation groups for any month will have been in the survey for the same month, 1 year ago. As a result, approximately 75 percent of the sample remains the same from month to month and 50 percent remains the same from year to year. This procedure strengthens the reliability of estimates of month-to-month and year-to-year change in the data. To be eligible to participate in the CPS, individuals must be at least 15 years of age and not in the Armed Forces. People in institutions, such as prisons, long-term care hospitals, and nursing homes are ineligible to be interviewed in the CPS. One person generally responds for all eligible members of the household. The person who responds is called the "reference person" and usually is the person who either owns or rents the housing unit.

CPS data on earnings are available on a weekly basis. All self-employed persons whose businesses are unincorporated are excluded from CPS. Data represent earnings before taxes and other deductions and include any overtime pay, commissions, or tips usually received. The earnings data are collected from one-fourth of the CPS total sample of

approximately 60,000 households. The survey questionnaire asks the respondent to identify the period for which they find it easiest to report earnings and requests an amount based on the specified period. Earnings data provided by respondents in periods other than weekly are converted to a weekly earnings estimates for the reported data.

For all analyses using CPS data, we used the following definitions and sample specifications:

Worker Population Definitions

The Current Population Survey currently uses the 2010 Census occupational classification and, beginning with data for January 2014, the 2012 Census industry classification. These classifications were derived from the 2010 Standard Occupational Classification (SOC) and the 2012 North American Industry Classification System (NAICS), respectively, to meet the special classification needs of demographic household surveys.

- Home care workers. For our analysis, we defined home care workers as those whose primary job was categorized in the following occupations:
 - Personal and home care aides (SOC 39-9021)
 - Nursing, psychiatric, and home health aides (SOC 31-1010)

Since some of the above occupations may include workers outside of a home care setting, we specified workers in those occupations that work in home care industries:

- Home health care services (NAICS 6216)
- Individual and Family Services (NAICS 6241)
- Private Households (NAICS 814)

These definitions may not directly overlap with the population covered by the Home Care Rule, but we believe they are a reasonable approximation.

- Occupations with similar entry requirements. Eight occupations with similar entry requirements were selected based on a prior DOL analysis that used May 2015 data from the BLS Occupational Employment Statistics Program. The occupations were: food preparation workers; combined food preparation and

serving workers, including fast food; waiters and waitresses; janitors and cleaners, except maids and housekeeping cleaners; maids and housekeeping cleaners; cashiers; retail salespersons; and stock clerks and order fillers. Home care and other occupations with similar entry requirements all required no formal educational credential for entry, required only short-term on-the-job training, had median pay of less than \$25,000 in 2015, and were projected to see at least 50,000 new jobs over a 10-year period. These other occupations represent those that home care workers can take up as an alternative to their current occupation.

Work Status Definitions

Based on CPS definitions of work status and overtime pay requirements in the Fair Labor Standards Act, we defined work status based on a worker's usual hours:

- Part-time status is defined as those who usually work less than 35 hours per week
- Full-time status is defined as those who usually work 35-40 hours per week
- Overtime status is defined as those who usually work over 40 hours per week

Sample Specifications

We calculated wage and earnings data among workers who met the following criteria: (1) they were employed, (2) they reported being paid at an hourly rate or said it was easier to report hourly earnings, and (3) they reported positive pay for their primary job.² We adjusted wages and earnings for inflation and expressed these data in 2019 U.S. dollars.

We calculated work status data among home care workers and workers in occupations with similar entry requirements who met the following criteria: (1) they were employed, and (2) they reported working one or more usual hours.

²Information on what people earn at their primary job is collected only for the outgoing rotation groups (those who are receiving their fourth or eighth monthly in interviews).

Analyses Conducted

From 2010 through 2019, we analyzed trends in annual estimates for median hourly wages and weekly earnings and average usual hours and work status among home care workers and occupations with similar entry requirements.

We used multivariate regression analyses to examine trends before and after implementation of the Home Care Rule regarding two areas: (1) the differences in pay between home care workers and occupations with similar entry requirements described above (similar occupations) and (2) the differences in the likelihood of working part-time, full-time, and overtime between home care workers and similar occupations.³

- Differences in pay. We conducted a regression analysis to test whether there were significant differences in pay between home care workers and similar occupations before and after implementation of the Home Care Rule when controlling for other factors.⁴ Our regression model is the following:

³In our analysis, references to “implementation of the Home Care Rule” refer to the period beginning on January 1, 2016. DOL began enforcement of the Home Care Rule on November 12, 2015. However, DOL stated that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance with the FLSA since the promulgation of the Home Care Rule. See Application of the Fair Labor Standards Act to Domestic Service; Dates of Previously Announced 30-Day Period of Non-Enforcement, 80 Fed. Reg. 65,646 (Oct. 27, 2015).

⁴Due to data limitations, we were unable to tell if there were differences in pay trends for workers who were employed with positive pay during the survey time relative to those who were not. Including unemployed workers or those who were employed without positive pay could change our regression estimates.

$Y_{ijt} = \gamma_0 + \gamma_1(\text{Home care}_j * \text{Post2015}_t) + \gamma_2\text{Home care}_j + \gamma_3\text{Post2015}_t + \beta_1 X_{ijt} + d_t + s_s + \varepsilon_{it}$, where Y_{ijt} is one of the measures of pay (i.e. weekly earning, hourly wage in adjusted 2019 dollars), indexed to the individual (i), the type of primary job (j), and time (t , where t =year*month, ex. 2019 Jan). Home care_j is an indicator that equals one if individual i 's main job was a home care job, and Post2015_t is an indicator that equals one for after implementation of the Rule. These indicators are combined ($\text{Home care}_j * \text{Post2015}_t$) to create a dummy variable equal to one for all periods after the Home Care Rule was implemented and when the individual was a home care worker. The coefficient γ_1 captures the difference in how pay changed between home care workers and similar occupations before and after implementation of the Home Care Rule. The model controls for time (d_t), state (s_s), and control for individual characteristics of age, gender, race/ethnicity, education, and citizenship (X_{ijt}), and ε_{it} is the error term.

Table 1 shows the estimated coefficient on γ_1 . Standard errors are in parentheses. As the table shows, we found no statistically significant differences (at the 95 percent confidence level) in pay between home care workers and similar occupations before and after implementation of the Home Care Rule when controlling for the factors described above. These results were consistent before and after accounting for the demographic and other factors described above.

Table 1: Regression Coefficients for Difference in Pay Analysis

Outcome variables	Weekly earnings	Hourly wage
Home Care * Post2015	0.867	-0.089
Standard errors	(5.15)	(0.10)
Observations	162,766	162,816

Source: GAO analysis of Current Population Survey data. | GAO-21-72

Note: Standard errors are in parentheses. GAO calculated these standard errors using the bootstrapped technique suggested by Bureau of Labor Statistics. GAO controlled for whether an individual's main job was a home care job, time periods, geographic units, and individual characteristics.

- Differences in the likelihood of working part-time, full-time, and overtime. To assess work status, we estimated a multinomial logistic model, a technique that allows us to estimate the likelihood of placement in one of several categories when controlling for additional factors. The model produces relative risk ratios that compare the likelihood of home care workers and similar occupations being part-time or overtime instead of the base

category of full-time after the Home Care Rule was implemented. A relative risk ratio of 1 indicates that home care workers and similar occupations have equal likelihood of being categorized as part-time or overtime instead of full-time. A relative risk ratio of less than 1 indicates that home care workers have lower likelihood than similar occupations of being part-time or overtime rather than full-time, and a relative risk ratio of greater than 1 indicates that home care workers have higher likelihood than similar occupations.

We controlled for whether an individual's main job was a home care job, and for time periods, geographic units, and individual characteristics. The relative risk ratios in table 2 demonstrate that home care workers are more likely to be working full-time compared to similar occupations after the Home Care Rule was implemented. These results were consistent before and after accounting for the demographic and other factors described above.

Table 2: Relative Risk Ratios for Difference in Work Status Analysis

Relative risk ratios	Part-time	Overtime	Interpretation	Observations
Being a home care worker after implementation of the Home Care Rule	0.91*** (0.02)	0.86*** (0.03)	The likelihood of working part-time and overtime were lower for home care workers after the Home Care Rule was implemented. This means home care workers were more likely to work full-time after the Home Care Rule was implemented, relative to similar occupations.	718,344

Source: GAO analysis of Current Population Survey data. | GAO-21-72

Note: Standard errors are in parentheses. GAO calculated these standard errors using the bootstrapped technique and design-effect adjustment suggested by Bureau of Labor Statistics. *** p<0.01. GAO controlled for whether an individual's main job was a home care job, and for time periods, geographic units, and individual characteristics. In GAO's analysis, references to "implementation of the Home Care Rule" refer to the period beginning on January 1, 2016. Department of Labor (DOL) began enforcement of the Home Care Rule on November 12, 2015. However, DOL stated that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance with the Fair Labor Standards Act since promulgation of the rule.

Because the survey data are based on probability samples, estimates are calculated using appropriate sample weights that reflect the sample design. To account for the sample representation and design used in the CPS, we used population weights present in the CPS basic monthly data.

We assessed the reliability of CPS data by reviewing methodological documentation and interviewing agency officials. We found the data to be reliable for describing trends in hourly wages, weekly earnings, and hours worked over time and by occupation. Our regression results do not directly evaluate the effect of the Home Care Rule. Rather, we describe trends that may provide insights into the effects of the rule, though there

are other factors that may influence these trends and that we cannot control for, such as differences in state policies in response to the Home Care Rule.

American Community Survey (ACS)

To determine the setting in which potential consumers of home care services live, we analyzed estimates from 2009 through 2018 from the Census Bureau's Public Use Microdata Sample (PUMS) of the ACS.⁵ The ACS is the premier source for detailed population and housing information in the United States, according to the Census Bureau. It is an ongoing national survey that collects information from an annual sample size of about 3.5 million households.

We analyzed trend data on potential consumers and the percentage of them who reported living in an institutional setting for 2009 through 2018. In our analysis, we identified potential consumers as those who reported having difficulties with self-care or independent living. In addition, we considered an individual living in an institutional setting if they reported living in institutional group quarters.⁶

Because the survey data are based on probability samples, estimates were calculated using appropriate sample weights that reflect the sample design. To account for the sample representation and design used in the ACS, we used population weights present in the ACS data. In addition, we used the successive difference replication method to estimate the standard errors around any population estimate. We also calculated growth rates between 2009 and 2018 for both the number of individuals who reported difficulties with self-care or independent living and the percentage of them living in institutional settings. We tested the statistical significance of these growth rates at the p-value <0.05 level. We assessed the reliability of ACS data by reviewing methodological documentation and found the data to be reliable for the purposes of describing whether a potential consumer of home care services lived in an institutional setting. We were not able to provide a breakdown by

⁵PUMS files for an individual year contain data on approximately 1 percent of the United States population.

⁶The Census Bureau classifies all people not living in housing units as living in group quarters. The two types of group quarters are: (1) institutional group quarters such as correctional facilities, nursing homes, and mental hospitals; and (2) non-institutional group quarters such as college dormitories, military barracks, group homes, missions, and shelters.

specific types of institutional group quarters because of the way publicly available data were reported.

Appendix II Sources and Methodology

To examine the Department of Labor's (DOL) efforts to provide guidance on the Home Care Rule, we spoke with DOL officials and reviewed current guidance documents. We also asked national stakeholder groups about DOL's guidance and enforcement efforts. To describe DOL's enforcement activity, we interviewed agency officials regarding their processes and analyzed data from the Wage and Hour Investigative Support and Reporting Database (WHISARD). WHISARD is an automated data processing system that enables investigators, managers, and assistants in DOL to process complaints, assign and investigate cases, manage and close cases, and report to management, among other activities. We used this database to analyze the number of compliance actions with FLSA findings DOL conducted, and violations it identified in the home care industry specifically.⁷ We assessed the reliability of WHISARD data by reviewing methodological documentation and interviewing agency officials. We found the data to be reliable for the purposes of this report.

We conducted this performance audit from April 2019 to October 2020 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit work to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

⁷Compliance actions include the following investigative tools: conciliations, full investigations, limited investigations, office audits, and self-audits.

Appendix II: Department of Labor Guidance and Enforcement Activity Related to the Home Care Rule




The Department of Labor (DOL) issued 11 guidance documents related to the Home Care Rule (see fig. 4).¹ These documents explain: the revisions made by the rule to the definition of companionship services; who can claim an exemption from minimum wage and overtime pay requirements for companionship services; how to determine when an entity is a joint employer of a home care worker; and how to determine hours worked and recordkeeping requirements, among other topics. In addition, DOL recently revised its regulations on determining joint employer status under the Fair Labor Standards Act.² Accordingly, DOL reviewed its existing guidance to ensure consistency with the new rule and removed outdated guidance as appropriate. For example, DOL officials told us they rescinded Administrator Interpretation No. 2014-2, which discussed how to determine joint employment in the context of consumer-directed programs funded by Medicaid.

¹Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454 (Oct. 1, 2013) (amending 29 C.F.R. pt. 552).

²Joint Employer Status Under the Fair Labor Standards Act, 85 Fed. Reg. 2820 (Jan. 16, 2020) (amending 29 C.F.R. pt. 791). In September 2020, a federal district court vacated key portions of this rule; the parties have 60 days to appeal the decision. *New York v. Scalia*, No. 20-cv-1689, 2020 WL 5370871 (S.D.N.Y. Sept. 8, 2020).

Appendix II: Department of Labor Guidance and Enforcement Activity Related to the Home Care Rule

Figure 4: Selected Topics Covered by Department of Labor’s Guidance Related to the Home Care Rule under the Fair Labor Standards Act (FLSA)

Guidance Document	Topics Covered
<p>Fact Sheet # 79 (September 2013)^a</p> <ul style="list-style-type: none"> Provides information on the definition of domestic service employment and private home for the purposes of the Fair Labor Standards Act (FLSA). 	 Caregivers
<p>Fact Sheet # 79A (September 2013)^a</p> <ul style="list-style-type: none"> Provides information on the definition of domestic service employment and companionship services. Identifies who can claim an exemption from minimum wage and overtime pay for companionship services. 	  Wages and overtime
<p>Fact Sheet # 79B (September 2013)^a</p> <ul style="list-style-type: none"> Provides information on the definition of live-in domestic service worker. Identifies who can claim an exemption from overtime pay for live-in domestic service workers and discusses the minimum wage requirements under the FLSA. Outlines requirement for the employer to establish an agreement of hours to be worked by the live-in worker and maintain a record of the agreement. 	 Live in/shared living  Record-keeping 
<p>Fact Sheet # 79C (September 2013)^a</p> <ul style="list-style-type: none"> Explains recordkeeping requirements for employers, including for live-in domestic service workers. 	 
<p>Fact Sheet # 79G (March 2014)</p> <ul style="list-style-type: none"> Provides information on shared living arrangements. Outlines how to determine hours worked and compensation for workers under shared living arrangement. Explains requirement to keep records of workers' hours and compensation. 	  
<p>Administrator’s Interpretation No. 2014-1 (March 27, 2014)^a</p> <ul style="list-style-type: none"> Provides information on shared living arrangements and the definitions of companionship services, domestic service employment, and live-in domestic service worker. Outlines factors for determining employment relationship and explains general wage and overtime requirements for shared living arrangements, calculating hours for live-in workers including sleep time, and who may claim an exemption from minimum wage/overtime pay. Explains recordkeeping requirements for hours worked and compensation paid. Discusses how to determine whether a joint employment relationship exists. 	     Joint employment
<p>Fact Sheet # 79F (June 2014)</p> <ul style="list-style-type: none"> Provides information on paid family and household care providers under certain Medicaid and other publicly-funded programs. Explains factors for determining the scope of the FLSA employment relationship for these paid family and household care providers. 	 
<p>Field Assistance Bulletin No. 2015-1 (December 17, 2015)</p> <ul style="list-style-type: none"> Explains how lodging may be credited towards wages under FLSA for live-in domestic service workers. Explains how joint employers may take credit toward their joint wage obligation for housing costs paid for live-in workers. 	  
<p>Fact Sheet # 79D (April 2016)</p> <ul style="list-style-type: none"> Outlines how to determine hours worked, including how to apply travel and sleep time. 	  
<p>Field Assistance Bulletin No. 2016-1 (April 25, 2016)</p> <ul style="list-style-type: none"> Outlines circumstances sleep time may be excluded from hours worked. 	 
<p>Field Assistance Bulletin No. 2018-4 (July 13, 2018)</p> <ul style="list-style-type: none"> Provides information on home care registries. Outlines factors for determining an employment relationship and whether such registries are employers under the FLSA. 	

Source: GAO analysis of Department of Labor’s Home Care Rule guidance documents. | GAO-21-72

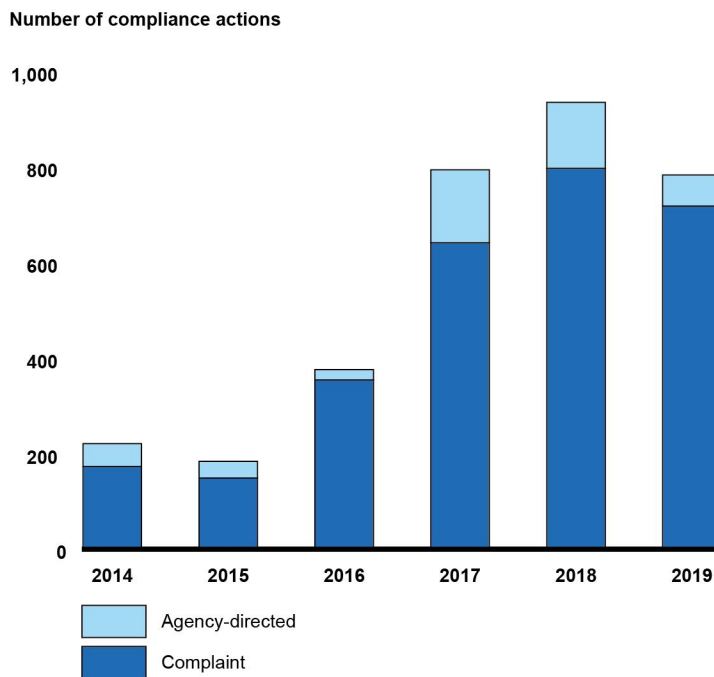
^aThe guidance refers to domestic service employment, which means services of a household nature performed by an employee in or about a private home, and can include services performed by employees such as companions, caretakers, home health aides, and personal care aides, among others. Home care workers, which GAO defines as those who provide assistance with activities of daily living (e.g., dressing, grooming, bathing, etc.) and instrumental activities of daily living (e.g., meal preparation, driving, light housework, etc.), are typically considered domestic service workers.

Our analysis of DOL data on its compliance actions with FLSA findings in the home care industry found that the number of such cases generally

Appendix II: Department of Labor Guidance and Enforcement Activity Related to the Home Care Rule

increased over the period of fiscal years 2014 through 2019.³ While DOL directed the initiation of some of these compliance actions, the majority arose from complaints (see fig. 5).

Figure 5: Number of Department of Labor’s Compliance Actions with Fair Labor Standards Act Findings in the Home Care Industry, by Fiscal Year Concluded and Case Type



Source: GAO analysis of Department of Labor Wage and Hour Investigative Support and Reporting Database (WHISARD). | GAO-21-72

Note: Department of Labor (DOL) began enforcement of the Home Care Rule on November 12, 2015. However, DOL stated that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance. According to DOL officials, the standard period of review for a compliance action covers the 2 years prior to the start of the case. As a result, the data do not reflect enforcement of the Home Care Rule during the entire review period until cases starting December 2017. The average case takes almost 6 months from start to conclusion. Consequently, most cases concluding in fiscal year 2019 reflect enforcement of the Home Care Rule during the entire review period, while cases concluding in prior fiscal years may also reflect enforcement of the prior regulations that were in place at some point during the cases' review period.

From fiscal years 2014 through 2019, 87 percent of DOL’s concluded compliance actions in the home care industry found a violation of the Fair Labor Standards Act. Over this time period, nearly half of the compliance

³Compliance actions include the following investigative tools: conciliations, full investigations, limited investigations, office audits, and self-audits.

**Appendix II: Department of Labor Guidance
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actions found minimum wage violations and nearly half found overtime violations (see table 3).

Table 3: Fair Labor Standards Act Violations Identified by Department of Labor in the Home Care Industry, by Fiscal Year

Category	2014	2015	2016	2017	2018	2019	Total
Percent of compliance actions with Fair Labor Standards Act violations	88%	83%	83%	87%	89%	89%	87%
Percent of compliance actions with minimum wage violations	44%	52%	55%	45%	46%	50%	48%
Percent of compliance actions with overtime violations	47%	42%	35%	48%	52%	49%	48%

Source: GAO analysis of Department of Labor Wage and Hour Investigative Support and Reporting Database (WHISARD). | GAO-21-72

Note: Department of Labor (DOL) began enforcement of the Home Care Rule on November 12, 2015. However, DOL stated that it would exercise prosecutorial discretion in determining whether to bring enforcement actions through December 31, 2015, with particular consideration given to the extent to which states and other entities had made good faith efforts to bring their home care programs into compliance. According to DOL officials, the standard period of review for a compliance action covers the 2 years prior to the start of the case. As a result, the data do not reflect enforcement of the Home Care Rule during the entire review period until cases starting December 2017. The average case takes almost 6 months from start to conclusion. Consequently, most cases concluding in fiscal year 2019 reflect enforcement of the Home Care Rule during the entire review period, while cases concluding in prior fiscal years may also reflect enforcement of the prior regulations that were in place at some point during the cases' review period.

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

In addition to the contact named above, Meeta Engle (Assistant Director); Amrita Sen (Analyst in Charge); Pin-En Annie Chou; Randi Hall; Rachel Stoiko; and Shelia Thorpe made key contributions to the report. Also contributing to this report were Blake Ainsworth, Susan Aschoff, Tim Bober, Tim Bushfield, Sarah Cornetto, Chas Culverwell, Nisha Hazra, Sheila R. McCoy, Michelle Munn, Danielle Novak, Cathy Roark, Karissa Robie, Almeta Spencer, Curtia Taylor, Anjali Tekchandani, and Khristi Wilkins.

Appendix IV: Accessible Data

Data Tables

Accessible Data for Estimated Median Weekly Earnings of Employed Workers, 2010 through 2019

Year	All employed workers	Home care workers	Occupations with similar education and training requirements
na	<i>Weekly earnings (adjusted for inflation to 2019 U.S. dollars)</i>		
2010	563	352	347
2011	546	355	341
2012	546	337	334
2013	549	329	329
2014	549	345	324
2015	561	351	345
2016	575	373	352
2017	584	373	365
2018	611	392	373
2019	600	400	390

Department of Labor begins enforcing Home Care Rule: Nov. 12, 2015

Source: GAO analysis of 2010-2019 Current Population Survey basic monthly data. | GAO-21-72

Accessible Data for Figure 1: Key Dates in Implementation of Department of Labor's (DOL) Home Care Rule Extending Federal Minimum Wage and Overtime Protections to More Home Care Workers

- October 1, 2013: DOL issued final Home Care Rule
- June 6, 2014: Home care associations filed federal lawsuit challenging the Home Care Rule
- December 22, 2014: U.S. District Court for the District of Columbia vacated a portion of the Home Care Rule
- January 1, 2015: Effective date of Home Care Rule
- January 14, 2015: U.S. District Court for the District of Columbia vacated another portion of the Home Care Rule
- August 21, 2015: U.S. District Court of Appeals for D.C. Circuit upheld Home Care Rule, overturning the district court decisions
- November 12, 2015: DOL begins enforcement ^a

Source: Department of Labor (DOL) Wage and Hour Division, "U.S. Court of Appeals Unanimously Upheld DOL Rule, Opinion Effective as of Oct. 13, 2015." | GAO-21-72

Appendix IV: Accessible Data

Accessible Data for Figure 2: Estimated Median Hourly Wage of Employed Workers, 2010 through 2019

Year	All employed workers	All employed upper 95% CI	All employed lower 95% CI	Home care workers	Home care upper 95% CI	Home care lower 95% CI	Occupations with similar entry requirements	Occupations with similar entry requirements upper 95% CI	Occupations with similar entry requirements lower 95% CI
na	<i>Hourly wage (dollars)</i>								
2010	14.66	14.67	14.65	10.83	11.19	10.47	10.55	10.62	10.48
2011	14.33	14.55	14.11	11.33	11.56	11.09	10.23	10.25	10.2
2012	14.26	14.48	14.04	11.1	11.43	10.76	10.02	10.03	10.01
2013	14.27	14.27	14.27	10.96	11.17	10.76	9.88	9.89	9.87
2014	14.05	14.05	14.05	10.77	10.87	10.68	9.99	10.06	9.93
2015	14.56	14.73	14.4	10.79	10.89	10.69	10.29	10.51	10.07
2016	14.92	14.92	14.92	10.92	11.28	10.57	10.66	10.66	10.65
2017	15.13	15.27	14.99	11.43	11.57	11.29	10.95	10.96	10.94
2018	15.28	15.28	15.28	11.58	12	11.15	11.2	11.21	11.2
2019	15.33	15.51	15.14	11.99	12.18	11.8	11.99	12	11.98

Department of Labor begins enforcing Home Care Rule: Nov. 12, 2015

Source: GAO analysis of 2010-2019 Current Population Survey basic monthly data. | GAO-21-72

Appendix IV: Accessible Data

Accessible Data for Figure 3: Estimated Median Weekly Earnings of Employed Workers, 2010 through 2019

Year	All employed workers	All employed upper 95% CI	All employed lower 95% CI	Home care workers	Home care upper 95% CI	Home care lower 95% CI	Occupations with similar entry requirements	Occupations with similar entry requirements upper 95% CI	Occupations with similar entry requirements lower 95% CI
na	<i>Weekly earnings (dollars)</i>								
2010	563	563	563	352	366	337	347	355	339
2011	546	548	544	355	375	336	341	344	338
2012	546	554	538	337	361	313	334	337	331
2013	549	550	548	329	351	308	329	333	326
2014	549	557	540	345	366	324	324	330	318
2015	561	562	561	351	372	329	345	349	342
2016	575	577	574	373	390	356	352	360	343
2017	584	590	579	373	389	358	365	368	362
2018	611	614	608	392	414	371	373	382	363
2019	600	603	597	400	415	384	390	400	380

Department of Labor begins enforcing Home Care Rule: Nov. 12, 2015

Source: GAO analysis of 2010-2019 Current Population Survey basic monthly data. | GAO-21-72

Appendix IV: Accessible Data

Accessible Data for Figure 4: Selected Topics Covered by Department of Labor's Guidance Related to the Home Care Rule under the Fair Labor Standards Act (FLSA)

Guidance Document	Topics Covered
<p>Fact Sheet# 79 (September 2013)^a Provides information on the definition of domestic service employment and private home for the purposes of the Fair Labor Standards Act (FLSA).</p>	<p>Caregivers</p>
<p>Fact Sheet# 79A (September 2013)^a Provides information on the definition of domestic service employment and companionship services. Identifies who can claim an exemption from minimum wage and overtime pay for companionship services.</p>	<p>Caregivers, Wages and overtime</p>
<p>Fact Sheet# 79B (September 2013)^a Provides information on the definition of live-in domestic service worker. Identifies who can claim an exemption from overtime pay for live-in domestic service workers and discusses the minimum wage requirements under the FLSA. Outlines requirement for the employer to establish an agreement of hours to be worked by the live-in worker and maintain a record of the agreement.</p>	<p>Live in/shared living, Record-keeping, Wages and overtime</p>
<p>Fact Sheet# 79C (September 2013)^a Explains recordkeeping requirements for employers, including for live-in domestic service workers.</p>	<p>Live in/shared living, Record-keeping</p>
<p>Fact Sheet# 79G (March 2014) Provides information on shared living arrangements. Outlines how to determine hours worked and compensation for workers under shared living arrangement. Explains requirement to keep records of workers' hours and compensation.</p>	<p>Live in/shared living, Record-keeping, Wages and overtime</p>
<p>Administrator's Interpretation No. 2014-1 (March 27, 2014)^a Provides information on shared living arrangements and the definitions of companionship services, domestic service employment, and live-in domestic service worker. Outlines factors for determining employment relationship and explains general wage and overtime requirements for shared living arrangements, calculating hours for live-in workers including sleep time, and who may claim an exemption from minimum wage/overtime pay. Explains recordkeeping requirements for hours worked and compensation paid. Discusses how to determine whether a joint employment relationship exists.</p>	<p>Caregivers, Live in/shared living, Record-keeping, Wages and overtime, Joint employment</p>
<p>Fact Sheet# 79F (June 2014) Provides information on paid family and household care providers under certain Medicaid and other publicly-funded programs. Explains factors for determining the scope of the FLSA employment relationship for these paid family and household care providers.</p>	<p>Caregivers, Wages and overtime</p>

Appendix IV: Accessible Data

Guidance Document	Topics Covered
<p>Field Assistance Bulletin No. 2015-1 (December 17, 2015) Explains how lodging may be credited towards wages under FLSA for live-in domestic service workers. Explains how joint employers may take credit toward their joint wage obligation for housing costs paid for live-in workers.</p>	Caregivers, Joint employment, Wages and overtime
<p>Fact Sheet # 79D (April 2016) Outlines how to determine hours worked, including how to apply travel and sleep time.</p>	Caregivers, Live in/shared living, Wages and overtime
<p>Field Assistance Bulletin No. 2016-1 (April 25, 2016) Outlines circumstances sleep time may be excluded from hours worked.</p>	Caregivers, Wages and overtime
<p>Field Assistance Bulletin No. 2018-4 (July 13, 2018) Provides information on home care registries. Outlines factors for determining an employment relationship and whether such registries are employers under the FLSA.</p>	Caregivers

Source: GAO analysis of Department of Labor's Home Care Rule guidance documents. | GAO-21-72

Accessible Data for Figure 5: Number of Department of Labor's Compliance Actions with Fair Labor Standards Act Findings in the Home Care Industry, by Fiscal Year Concluded and Case Type

Fiscal year	Complaint	Agency-directed
na	<i>Number of compliance actions</i>	
2014	169	48
2015	145	35
2016	350	22
2017	637	153
2018	793	138
2019	714	65

Source: GAO analysis of Department of Labor Wage and Hour Investigative Support and Reporting Database (WHISARD). | GAO-21-72

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