Hodgson Russ LLP ATTORNEYS

END-OF-YEAR UPDATES FOR HOME CARE PROVIDERS

Home Care Alert
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NYS DOL Re-Issues Proposed Regulations Governing Worker Scheduling Practices

As we had previously reported in November of 2017, the New York State Department of Labor ("DOL") proposed regulations that would require agencies to start paying non-exempt employees
for on-call time, cancelled shifts, or shifts that were scheduled on short notice ("Proposed Regulations"). After conducting public hearings and reviewing comments concerning the Proposed Regulations, the DOL issued revised Proposed Regulations on December 12, 2018.

By way of background, the DOL's regulations currently require that non-exempt employees who
report to work be paid for at least 4 hours or the number of hours in the employee's regularly
scheduled shift, whichever is less, at the State minimum wage rate. This "call-in pay" obligation
typically arises where an employee reports to work but his/her shift is cancelled due to factors
beyond the employee's control or the employer's workplace is closed (e.g., electricity goes out and all employees are sent home for the day). Importantly, the current DOL rules relieve agencies of this call-in pay obligation if the employee's regular wages for the week are sufficiently above the minimum wage to "cover" any call-in pay that may be due to the employee. The DOL's Proposed Regulations, however, would retain the call-in pay obligation but they would eliminate this "offset" mechanism under the currentcall-in pay regulations so thatcovered employees, regardless of their wage rates, will be entitled to receive call-in pay.

In addition, the Proposed Regulations would require agencies to pay employees for: (1) unscheduled shifts, (2)cancelled shifts, (3) on-call time, and (4)call for schedule shifts. These 4
newly-created pay obligations would apply in the following situations:

- *Unscheduled Shifts*: The Proposed Regulations provide pay to employees who are not
given at least 14 days' advance notice of a shift. In the event an employee is

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required to work a shift on less than 14 days' notice, the agency would have to pay the employee an additional 2 hours of call-in pay.
o This requirement would not apply to new employees during the first 2 weeks of his/her employment or any employee who volunteers to cover a new shift or previously scheduled shift.
o This requirement also would not apply if the agency offers employees the option to volunteer to reduce or increase their scheduled hours due to a weather or travel advisory.

- *Cancelled Shifts:* The Proposed Regulations require that an agency pay an employee for a shift cancellation without advance notice. Specifically, an employee would be entitled to at least 2 hours of call-in pay for a shift cancelled with less than 14 days' notice, or at least 4 hours of call-in pay paid at the minimum wage when a shift is cancelled within 72 hours of the start of the shift.
o This requirement also would not apply if the agency offers employees the option to volunteer to reduce or increase their scheduled hours due to a weather or travel advisory.
o This requirement does not apply where the agency cancels a shift due to weather or travel advisories.
- *On-Call Shifts:* The Proposed Regulations require agencies to pay employees for 4 hours of "on-call" time, which is the time that an employee is required to be available to report to work if needed.
- *Call For Schedule Shifts:* Under the Proposed Regulations, an employee who is required to contact the agency within 72 hours of the start of their shift to confirm whether to report to work or not would be entitled to at least 4 hours ofcall-in pay.

Calculation of Call-in Pay
Each of the above categories of call-in pay may be paid at the minimum wage rate in effect for the employee. For any periods of actual work, the employee's regular rate of pay or overtime would be required.

Call-in pay payments would not be considered pay for time worked and, thus, do not need to be included in the regular rate for purposes of calculating overtime pay. Call-in pay cannot be offset by the "required use of leave time" or by "payments in excess of those required" by the proposed regulation. It is not clear whether call-in pay may be offset by PTO pay for non-required leave time (e.g., vacation or holiday pay).

Exclusions from Coverage
The following employees will not be covered by the Regulations:

1. Employees covered by a collective bargaining agreement that provides for call-in pay;
2. Employees who are exempt under the professional, administrative or executive exemptions;
3. Employees whose weekly wages exceed 40 times the applicable basic hourly minimum wage rate (e.g., more than $600 a week for those employed by "large" employers in New York City in 2019). However, pay for call-in situations would still be due, irrespective of the employee's total weekly earnings.

In addition, pay for Cancelled Shift, On-Call, Call for Schedule, and Unscheduled Shift would not apply to employees whose weekly compensation exceeds the number of hours worked, multiplied by the applicable minimum wage rate, and:
1. Whose duties are directly dependent on weather conditions

2. Whose duties are necessary to protect the health or safety of the public or any person
3. Whose assignments are subject to work orders, or cancellations thereof

The Proposed Regulations do not apply to certain nonprofit institutions.

The DOL's Proposed Regulations Leave Many Questions Unanswered

The Proposed Regulations do not address critical issues, such as:
1. Does the exception that applies to workers whose duties are necessary to "protect the health or safety of any person" always apply to home health aides or is the home care agency required to apply this exception on a case by case basis?
2. For on-call shifts, if the employee who is on-call resides in one geographic area and the business is in a different geographic area, what minimum wage rate applies to that employee's on-call time pay?
3. What types of provisions do collective bargaining agreements have to have concerning on-call pay in order to avoid the Proposed Regulations?
4. Does overtime pay count towards the employee's weekly wages so that employees who are earning overtime pay are not entitled to receive pay for cancelled shifts, unscheduled shifts, call for schedule pay or on-call pay?
5. Does PTO or holiday pay paid in the same week as a cancelled shift, unscheduled shift, on-call shift, or call-for-schedule shift count as compensation that can offset an employee's entitlement to pay for on-call shifts, call for schedule shifts, cancelled shifts, or unscheduled shifts?
6. For workers covered by wage parity, do non-wage benefits count as compensation that can be considered as an offset to the obligation to pay for cancelled shifts, unscheduled shifts, on-call shifts, or call-for-schedule shifts?
7. For fiscal intermediaries, where the consumer controls the scheduling, will the fiscal intermediary be responsible for paying personal assistants cancelled shift pay if a consumer cancels a shift?
8. Can agencies avoid paying for cancelled shifts, unscheduled shifts, on-call shifts, or call-for schedule shifts by simply paying some nominal amount (such as 1 cent) to employees on top of and in addition to their earned wages? The Proposed Regulations suggest that, so long as the employee's total weekly compensation is just above minimum wage for every hour worked, the employee is not entitled to pay for cancelled shifts, unscheduled shifts, on-call shifts, or call-for-schedule shifts.

What's Next?
The Proposed Regulations are subject to public review and comment through January 11, 2019. Agencies who wish to submit comments with respect to the proposed Regulations should contact any one of our Labor and Employment attorneys. We will be submitting comments to the New York Department of Labor on behalf of home care providers. In addition, since some form of these Proposed Regulations is likely to become law, agencies are encouraged to begin considering how these requirements will affect their operations and overall overhead.

DOH Proposes Rule Regarding Annual LHCSA Registration

The DOH has proposed regulations that would incorporate the newly enacted annual LHCSA registration requirements.

As we have previously reported, the DOH now requires that LHCSAs register each year, with stiff penalties facing LHCSAs that fail to do so. The DOH has also committed to notifying MLTCs of all non-registered LHCSAs, presumably so that non-registered LHCSAs are prohibited from billing MLTCs for their services.

The DOH's proposed regulation, like the statute, provides that LHCSAs must register with the DOH through the completion of annual registration forms that will be included in the annual statistical report. The regulations reiterate that LHCSAs cannot operate, provide nursing, home health aide, or personal care services **or receive reimbursement from any source** for the provision of such services during any period of time **on or after January 1, 2019**, unless the LHCSA has registered for the current period. A LHCSA that fails to submit a complete and accurate set of all required registration materials by the annual deadline of November 16th is required to **pay a fee of $500** for each month, or part thereof, that the LHCSA is not registered. A LHCSA that fails to register in one year will be required to pay all the late fees before it will be allowed to register in a second year. The DOH may revoke the license of any LHCSA that fails to register for 2 annual registration periods, whether or not such periods are consecutive. The proposed regulations state that the DOH will revoke the license of any LHCSA that submits late registrations over the course of several years without acceptable justification. It appears that a "late" registration is considered, for this 2018 filing cycle, to be any application that is submitted after November 16, 2018.

NY Paid Family Leave Increases Effective January 1, and Other Developments

As we have previously reported, the New York Paid Family Leave Law that took effective January 1, 2018 contains a phased-in system of paid, job-protected leave for eligible workers.

Effective January 1, 2019, the paid leave period under the NY Paid Family Leave will increase from 8 weeks to 10 weeks per year. Also effective January 1, 2019, employees taking NY Paid Family Leave will receive 55% of their average weekly wage (up from 50% in 2018), up to a cap of 55% of the current Statewide Average Weekly Wage ($1,357.11). In other words, the maximum weekly benefit for 2019 for employees who are on NY Paid Family Leave will increase from $652.96 to $746.41. To account for the increase to the benefit, the employee contribution rate will also increase from 0.126% to 0.153% of an employee's gross wages each pay period (capped at the Statewide Average Weekly Wage), which means that an employee's maximum annual contribution will increase from $85.56 to $107.97. Employees earning less that the Statewide Average Weekly Wage, however, will contribute less, consistent with their actual wages. Employers may start taking deductions from employees at the new rate on January 1, 2019.

The State has also updated the FAQ section of its website, clarifying that the benefits available to employees who start NY Paid Family Leave in 2018 that extends into 2019 will receive the benefit rate and amount of paid time off that was in effect on the first day of their leave. Thus, for example, an employee who begins their Paid Family Leave in 2018 that extends into 2019 will receive the 2018 rate for benefits while they are taking the leave in 2019. However, with respect to employees who start taking intermittent Paid Family Leave in 2018, the State FAQs provide as follows: *When more than three months passes between days of Paid Family Leave, your next day or period of Paid Family Leave is considered a new claim under the law. This means you will need to file a new Request for Paid Family Leave and that you may be eligible for the increased benefits available should this day or period of Paid Family Leave begin in 2019.* The new FAQs also confirm that employees who have exhausted all of their NY Paid Family Leave in 2018 may be eligible for up to 2 weeks of additional NY Paid Family Leave in 2019 if they experience a qualifying event. The State explains *that the maximum amount of leave in 2019 is 10 weeks in a 52 week period. If you took eight weeks of PFL in the last 52 weeks, and have another qualifying event in 2019, you may be limited to two weeks at the new rate, since it is a rolling calendar. When it has been 52 weeks from your 2018 leave dates, you will accrue a new week of available PFL up to another eight weeks.*

NYS Minimum Wage and Minimum Salary Levels for Certain Exempt Employees to Increase on December 31

Effective December 31, 2018, employees who are exempt from overtime requirements under the executive and administrative exemptions must receive, at a minimum, the below salary amounts each week in order to retain their exempt status. The salaries can be paid less frequently than weekly. Failure to pay executive and administrative employees in accordance with these minimum salary requirements will result in such employees becoming non-exempt (i.e., eligible for overtime).

Geographic Region Minimum Salary Required to be Paid
NYC Employers with 11 or more employees $1,125.00 per week ($58,500 annually)
NYC employers with 10 or fewer employees $1,012.50 per week ($52,650 annually)
Nassau, Suffolk, or Westchester employers $900 per week ($46,800 annually)
Remainder of New York State employers $832 per week ($43,264 annually)

In addition, New York State minimum wage will increase in accordance with the below schedule, effective December 31:

Geographic Region Minimum Hourly Wage Required to be Paid
NYC Employers with 11 or more employees $15.00 per hour
NYC employers with 10 or fewer employees $13.50 per hour
Nassau, Suffolk, or Westchester employers $12.00 per hour
Remainder of New York State employers $11.10 per hour

Suffolk County Law will Prohibit Employers from Asking Job Applicants about their Salary History

Effective June 30, 2019, employers with at least 4 workers in Suffolk County will be prohibited from inquiring about job applicants' wage or salary information during the hiring process. The Restricting Information on Salaries and Earnings Act (the "RISE Act") states that it is an unfair

discriminatory practice for an employer or employment agency to: (a) Inquire, whether in any form of application or otherwise, about a job applicant's wage or salary history, including but not limited to, compensation and benefits and (b) Rely on the salary history of an applicant for employment in determining the wage or salary amount for such applicant at any stage in the employment process, including at offer or contract. Employers whose job applications have questions about the applicant's wage or hourly rate information on them must be amended to conform with this law.

NYC Council Bans Discrimination on the Basis of Employees' Sexual and Reproductive Health Decisions

On December 20, 2018, the New York City Council voted to amend the NYC Human Rights Law to add "sexual and reproductive health decisions" to the list of protected classes under the City's law. The amendment will make it illegal for New York City employers with four or more employees to discriminate against applicants or employees based on sexual and reproductive health decisions. For purposes of the law, "sexual and reproductive health decisions" is defined as "any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions. Such services include, but are not limited to, fertility-related medical procedures, sexually transmitted disease prevention, testing, and treatment, and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing, and abortion."

The amendment is awaiting Mayor DeBlasio's signature and it would become effective 120 days thereafter.

If enacted, covered employers should consider updating their written policies prohibiting discrimination and training employees and managers regarding this new protected category.