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TO: **Memo Distribution List**

Empire State Association of Assisted Living

FROM: Hinman Straub P.C.

RE: Federal Court Decision and Other Recent Developments Regarding New York State Minimum Wages for 24-Hour Home Care Employees

DATE: December 27, 2017

NATURE OF THIS INFORMATION: This is information explaining new requirements you need to be aware of or implement.

DATE FOR RESPONSE OR IMPLEMENTATION: This regulation was published in the New York State Register on October 25, 2017 and adopted on an emergency basis. The emergency regulation is effective as of October 6, 2017.

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan, Joseph Dougherty, Michael Paulsen, Matthew O'Neil, and David Morgen.

THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:
Category: #4 Regulatory Process Suggested Key Word(s):

INTRODUCTION

On December 15, 2017, the United States District Court for the Southern District of New York ("S.D.N.Y.") issued a decision in *de Carrasco v. Life Care Services, Inc.* (No. 17-cv-5617[KBF], 2017 WL 6403521 [S.D.N.Y. Dec. 15, 2017]). The plaintiffs in *de Carrasco* are 24-hour home care employees ("24-Hour Employees") who alleged violations of the state minimum wage law. In its decision, S.D.N.Y. ruled that New York law permits employers to pay 24-Hour Employees for only 13 hours of a 24-hour shift, so long as the individuals receive time for meals and sleep as required by the N.Y.S. Department of Labor's ("NYSDOL") Opinion Letter No. RO-09-0169 (the "Opinion Letter") and the October 25, 2017 NYSDOL Emergency Regulations (I.D. No. LAB-43-17-00002-E), which clarified the minimum wage rules applicable to 24-Hour Employees (12 NYCRR 142-2.1 [b]; 12 NYCRR 142-3.1 [b]; and 12 NYCRR 142-3.7).

The *de Carrasco* decision reinforces the split between federal and state courts regarding the Opinion Letter. As discussed in prior memoranda, NYSDOL's position is consistent with the Opinion Letter and federal court decisions. As discussed in prior memoranda, state appellate courts in *Tokhtaman v. Human Care, LLC*, 149 A.D.3d 476 (1st Dep't 2017), *lv dismissed* 30 NY3d 1010 (2017); *Andryeyeva v. New York Health Care, Inc.*, 153 A.D.3d 1216 (2d Dep't 2017); and *Moreno v. Future Care Health Services, Inc.*, 153 A.D.3d 1254 (2d Dep't 2017) reached a different result. In those cases, which are now in the discovery stage, the state appellate courts allowed classes of 24-Hour Employees to claim violations of state minimum wage law even if their employer followed the Opinion Letter.

Furthermore, the Emergency Regulations were recently challenged by the Urban Justice Center, an advocacy group in New York City. The challenge is pending before the Industrial

Board of Appeals ("IBA"). The IBA is an administrative agency that can review and modify or revoke all NYSDOL regulations.

In sum, despite the recently adopted NYSDOL Emergency Regulations, the number of hours for which 24-Hour Employees might need to be compensated under New York state law remains under contention.

BACKGROUND ON THE MINIMUM WAGE REGULATION AND LEGAL CHALLENGES

A. The Opinion Letter

NYSDOL's minimum wage regulations, also called minimum wage orders (12 NYCRR 142-2.1; 12 NYCRR 142-3.1), provide that employers must pay the minimum wage for, among other things, time that an employee is "required to be available for work at a place prescribed by the employer." 12 NYCRR 142-2.1 (b). However, a "residential employee—one who lives on the premises of the employer" need not be paid "during his or her normal sleeping hours solely because he is required to be on call" or "at any other time when he or she is free to leave the place of employment" (the "Residential Exception"). *Id.*

In 2010, NYSDOL issued an Opinion Letter, which opined that employers need to only pay 24-Hour Employees spread of hours pay for 13 hours of every 24-hour shift, so long as the employee is afforded eight (8) hours of sleep (with five [5] hours uninterrupted) and three (3) uninterrupted hours for meals (the "13 Hour Rule"). *See* Opinion Letter No. RO-09-0169. Thus, NYSDOL did not require 24-Hour Employees to be paid "based upon the employee's residential status," rather, in NYSDOL's view the 13 Hour Rule applied to all 24-Hour Employees "regardless of whether they are residential." *de Carrasco*, 2017 WL 6403521, *5-6.

B. Legal Challenges Related to the Opinion Letter

Thereafter, some 24-Hour Employees brought class-action lawsuits in state and federal court claiming that they were entitled to additional wages. They generally argued that the 13 Hour Rule in the Opinion Letter did not apply to them inasmuch as it conflicted with the Residential Exception in the regulations. The employees claimed that, under state law, they were entitled to minimum wages for each hour of their 24-hour shift. State and federal litigation took different paths.

i. State Court Decisions Lead to the Emergency Regulation

In New York state court, the First and Second Departments of the Appellate Division each issued decisions granting class certification to 24-Hour Employees who alleged that they were not residential employees. *See Tokhtaman*, 149 A.D.3d 476, 477; *Andryeyeva*, 153 A.D.3d 1216, 1219; *Moreno*, 153 A.D.3d 1254, 1256. These state courts held that non-residential 24-Hour Employees "were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals." *Andryeyeva*, 153 A.D.3d at 1219, *citing Tokhtaman* 149 A.D.3d at 477. Essentially, the courts took the view that the 13-Hour Rule was invalid to the extent that it was broader than the Residential Exception. The State's highest court (the Court of Appeals), has so far declined to review the issue.

As discussed in a recent memorandum, NYSDOL reacted to *Andryeyeva*, *Moreno*, and *Tokhtaman* by publishing Emergency Regulations clarifying the state minimum wage regulations to explain that they "shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home

care aide who works a shift of 24 hours or more" (12 NYCRR 142-2.1 [b] [as amended October 25, 2017]).[1] In essence, NYSDOL tried to clarify the applicability of the 13-Hour Rule to 24-Hour Employees by placing the relevant concepts from the 2010 Opinion Letter into the text of the minimum wage regulations themselves.

ii. Federal Courts Have Consistently Agreed with NYSDOL

Federal courts, unlike state courts, have consistently held that the 13-Hour Rule is valid. *See Bonn-Wittingham v. Project O.H.R. (Office for Homecare Referral), Inc.*, 16-CV-541 (ARR)(JO), 2017 WL 2178426 (E.D.N.Y. May 17, 2017); *Severin v. Project OHR, Inc.*, No. 10 Civ. 9696(DLC), 2012 WL 2357410 (S.D.N.Y. June 20, 2012). Just last week in *de Carrasco*, the first decision since the Emergency Regulations were issued,[2] a federal court again considered the validity of the 13 Hour Rule. As relevant here, S.D.N.Y. reaffirmed "that the Opinion Letter" and, by extension, the 13 Hour Rule, "is neither 'unreasonable' nor 'irrational.'" 2017 WL 6403521, *7. The court explained that the Emergency Regulations "bolstered" its view of New York state minimum wage law, and explicitly "reject[ed] the *Tokhtaman* line of cases from the New York Appellate Division." *Id.*

[1] The term "home care aide" appears to have the same meaning as in the Home Care Worker Wage Party law, and thus includes 24-Hour Employees. *See* Public Health Law § 3614-c (1) (d).

[2] *Andryeyeva*, *Moreno*, and *Tokhtaman* are currently in discovery at the trial-court level. There is no motion or decision of record in any of these cases where the trial court interpreted the Emergency Regulations.

CHALLENGE TO THE EMERGENCY REGULATIONS

Earlier this month, the Urban Justice Center, a not-for-profit advocacy organization in New York City, challenged the Emergency Regulations before the IBA. This challenge creates additional uncertainty regarding the Emergency Regulations.

The IBA is an independent review board made up of five attorneys appointed by the Governor. The IBA has the authority to review and modify or revoke all NYSDOL rules, regulations, and orders. Although the IBA typically upholds NYSDOL regulations, earlier this year, the IBA overturned a different NYSDOL regulation, so the outcome of the Urban Justice Center's challenge is less predictable.[3]

NYSDOL will have the opportunity to respond to the administrative challenge. The Emergency Regulations will remain in effect while the challenge is pending, unless the IBA orders otherwise. The challenge will most likely be heard by the entire IBA and decided in relatively short order. Based upon prior IBA proceedings, a decision could come in early 2018. IBA decisions may be appealed to the state court system.

The Emergency Regulations were scheduled to expire on January 3, 2018. NYSDOL could extend them or publish a proposed rule to replace the Emergency Regulations. Regardless, we expect that the IBA will eventually be asked to rule on whether the policy contained in the Emergency Regulations is reasonable and legally valid.

IMPLICATIONS OF THE RECENT DEVELOPMENTS

S.D.N.Y. in *de Carrasco* reiterated its disagreement with recent state court decisions holding that the 13 Hour Rule only applied to 24-Hour Employees who resided in the home in which they worked. This decision is a positive development, and indicates that the risk of 13

[3] *See Matter of Global Cash Card, Inc. v Commissioner of Labor*, IBA Dkt. No. PR 16-120 (Feb. 16, 2017), *available at* http://industrialappeals.ny.gov/decisions/pdf/pr-16-120.pdf.

Hour Rule related minimum wage claims by 24-Hour Employees remains less significant in federal court, especially in light of the Emergency Regulations. Federal courts in New York have consistently concluded that payment practices that follow the 13 Hour Rule meet the requirements of the state minimum wage regulations.

However, federal district court decisions interpreting state law are not binding on state courts. Furthermore, the Emergency Regulations themselves could be overturned by the IBA. As a result, the effect of the Emergency Regulations in state court remains uncertain.

Hinman Straub P.C. will continue to monitor court decisions and regulatory actions regarding the 13 Hour Rule as the situation evolves. Please contact Sean M. Doolan, Joseph M. Dougherty, or Benjamin M. Wilkinson with any questions that you have at (518) 436-0751 or sdoolan@hinmanstraub.com; jdougherty@hinmanstraub.com; and bwilkinson@hinmanstraub.com.

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