

February 2, 2018

New York State Department of Labor Extends Emergency Rule Regarding Home Care Workers' Pay to April 4, 2018

On January 24, 2018, the New York State Department of Labor (“DOL”) extended until April 4, 2018 the Emergency Rule¹ amending the Minimum Wage Order for Miscellaneous Industries and Occupations as it relates to hours of work for live-in home care workers. No changes were made to the Emergency Rule aside from the extension.

The Emergency Rule, which was initially issued on October 25, 2017 and expired on January 3, 2018, codified and reaffirmed the DOL’s long-standing position that employers are not required to compensate live-in home care workers who work shifts of 24 hours or more for meal periods and sleep time if such an agreement exists, whether implicitly or explicitly, between the live-in worker and the employer.

Under the so-called “13-hour rule,” meal periods and sleep time do not constitute hours worked for purposes of minimum wage and overtime requirements. As such, home care agencies do not have to pay their live-in workers for up to 8 hours of sleep time (if the employee is able to get at least 5 uninterrupted hours of rest) and up to 3 uninterrupted hours of meal time per 24-hour shift. The Emergency Rule added the following language throughout the regulation:

Notwithstanding the above, this subdivision 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.

The DOL adopted the Emergency Rule in response to recent New York Appellate Court decisions finding that the “13-hour rule” is an improper interpretation of New York Labor Laws and accompanying regulations as applicable to live-in home care workers who work shifts of 24 hours or more. The court decisions reject DOL opinion letters supporting the 13-hour rule and declare them inconsistent with the regulations. However, for nearly a decade, the home care industry has relied on these opinion letters for guidance on how to compensate live-in home care workers who work shifts of 24 hours or more.

The DOL explained that the Emergency Rule is needed to “[P]reserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in the face of recent decisions by the State Appellate Divisions that treat meal periods and sleep time by home care aides who work shifts of 24 hours or more as hours worked for purposes of state (but not federal) minimum wage.”

For now, home care agencies may continue their pay practices in compliance with the DOL’s “13-hour

¹ The Department of Labor Emergency Rule is on page 7 of the January 24, 2018 publication of the NYS Register, which is accessible at the following link: <https://docs.dos.ny.gov/info/register/2018/jan24/pdf/Rule%20Making.pdf>

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rule” and the Fair Labor Standards Act. The DOL is expected to formally adopt the new rule amending the Wage Order in the near future. Pullano & Farrow will continue to monitor this issue and provide relevant updates.

If you have any questions about this Legal Briefing, please contact any attorney of our Firm at 585-730-4773.

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