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TO: **Memo Distribution List**

LeadingAge New York

FROM: Hinman Straub P.C.

RE: NYS Department of Labor Emergency Regulation for 24-Hour/Live-in Home Care Aide Wage Requirements

DATE: October 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):

On October 25, 2017, the New York State Department of Labor ("NYS DOL") adopted an emergency regulation, effective October 6, 2017, reaffirming DOL's long-standing "13-hour rule" for compensation of 24 hour "live-in" home care employees. The regulation has been published, according to the NYS DOL, to "preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home." As recent decisions by the State Appellate Divisions for the First and Second Departments rejected the NYS DOL opinion letters establishing the "13-hour rule" as inconsistent with regulations governing minimum wage, the emergency regulation codifies the NYS DOL's interpretation that meal periods and sleep times do not constitute hours worked for purposes of minimum wage and overtime requirements for a home care aide who works a shift of 24 hours or more. A copy of the emergency regulation is **attached**.

The regulation has been adopted on an emergency basis and, pursuant to state law, will expire on January 3, 2018. The NYS DOL intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rulemaking in the *State Register*. The NYS DOL will likely continue to extend this regulation on an emergency basis until the permanent rule is adopted. It is important to highlight that this regulation currently only applies to "home care aides"[1]; however, the Commissioner intends for the permanent regulation to address all other workers who work shifts of 24 hours or more.

## 1. Background

A number of recent court cases have arisen relating to the NYS DOL interpretation and enforcement of New York's minimum wage law as applicable to 24-hour "live in" home care attendants. The primary issue is the applicability of the NYS DOL residential exception, which provides that residential employees need only be paid for 13 hours of every 24–hour shift ("13 hour rule"), to home care attendants who maintain their own residence and therefore might not actually "live in" the home of his or her employer ("non-residential").

12 NYCRR § 142–2.1(b) provides that the minimum wage must be paid for each hour an employee is required to be available for work at a place prescribed by the employer, except that 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." A 2010 NYS DOL Opinion Letter (RO-09-0169), relating to wage practices for home care attendants and does not distinguish between "residential" and non-residential" employees, adopted the policy that all home care workers who work 24-hour shifts must be paid for 13 hours provided the worker is afforded eight hours of sleep, five of which were uninterrupted, and was afforded three uninterrupted hours for meals. If an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable

[1] "Home care aide" is not defined in the minimum wage regulation or under the Labor Law. The Public Health Law, however, does define "home care aide" to include the following: "home health aide, personal care aide, home attendant, personal assistant performing consumer directed personal assistance services pursuant to section three hundred sixty-five-f of the social services law, or other licensed or unlicensed person whose primary responsibility includes the provision of in-home assistance with activities of daily living, instrumental activities of daily living or health-related tasks". PHL § 3614-C(1)(d).

and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.

Recently, the State Appellate Divisions for the First and Second Departments rejected the NYS DOL "13 hour rule" as applicable to home care attendants who maintain their own residence, concluding that it is inconsistent with the plain language of NYS DOL regulations requiring payment of at least the minimum wage for all 24-hours of a live-in shift for aides who are not "residential" employees.[2] The court concluded that to the extent home care attendants are not residential employees who "lived on the premises of the employer", they are 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.

These decisions undermined the continued reliance by the home care industry on the 2010 DOL Opinion Letter permitting agencies to pay all "live in" home care attendants for 13 hours of every 24–hour shift. In order to eliminate any instability within the home care industry introduced by these decisions, the emergency regulation codifies the NYS DOL's longstanding and consistent interpretation that compensable hours worked under the State Minimum Wage Law do not include meal periods and sleep time of home care aides who work shifts of 24 hours or more.

## 2. Summary of Emergency Regulation

The emergency regulation amends regulations governing minimum wage pay (12 NYCRR §§ 142-2.1, 142-3.1, and 143.7) to provide that, notwithstanding minimum wage requirements, the regulation shall not be construed to require that that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act (FLSA) for a home care aide who works a shift of 24 hours or more, in accordance with sections 29 C.F.R. §§ 785.19 and 785.22. These two federal regulations provide that employers do not need to pay employees for "bona fide meal periods" ("Meal Periods") and "bona fide regularly scheduled sleeping periods" ("Sleep Periods") under the FLSA. Accordingly, the emergency regulation provides that Meal Periods and Sleep Periods that are not compensable for FLSA purposes are also excluded from calculation of hours State Minimum Wage Law.

Under these federal regulations, the employer and the home care aide must first agree to exclude Meal Periods and Sleep Periods from compensable time, and in the absence of an express or implied agreement to the contrary, the Meal Periods and Sleep Period are compensable.[3] For a Sleep Period to be excluded from compensable time, it must be for eight hours or less, and the home care aide must be "provided adequate sleeping facilities . . . and the [home care aide] can usually enjoy an uninterrupted night's sleep."[4] If the 24-Hour employee's sleep period is interrupted by a call to work, then time devoted to the interruption is compensable, and if the

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[2] *Tokhtaman v. Human Care, LLC et al.*, 2016 N.Y. Slip Op. 31606(U) (Sup. Ct. N.Y Cnty. August 22, 2016), *aff'd*, 149 A.D.3d 476 (1st Dep't Apr. 11, 2017); *Andreyeyeva v. New York Health Care, Inc.*, 45 Misc.3d 820 (Sup. Ct. Kings County Sept. 16, 2014), *aff'd* 153 A.D.3d 1216 (2nd Dept. Sept. 13, 2017)*; Moreno v. Future Care Health Services, Inc.*, 2015 N.Y. Slip Op. 31752(U) (Sup. Ct. N.Y Cnty. May 5, 2015), *aff'd* 153 A.D.3d 1254 (2nd Dept. Sept. 13, 2017).

[3] 29 C.F.R. § 785.22(a).

[4] Id.

interruptions are such that the employee cannot get a reasonable night's sleep, then the entire eight-hour sleep period is compensable.[5]

Similarly, Meal Periods are rest periods where the employee is "completely relieved from duty for the purposes of eating regular meals."[6] "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating."[7] Generally, 30 minutes or more is long enough for a Meal Period, and shorter periods may qualify under special circumstances. However, coffee breaks or time for snacks do not qualify as Meal Periods.

Notably, the emergency regulation clarifies that employers may now satisfy the State Minimum Wage Law with respect to 24-hour home care aides by complying with the FLSA and accompanying regulations. As employers were previously subject to the FLSA in operating under the "13-hour" rule, the emergency regulation allows for the continuation of payment practices in compliance with the "13-hour rule", so long as such practices were compliant with the FLSA.

### 3. Impact of Emergency Regulation

The emergency regulation removes uncertainty regarding home care agency obligations, in light of the recent court decisions, by clarifying that the previously promulgated DOL guidelines were consisted with the intent of current regulation. Specifically, the emergency regulation clarifies that, for purposes of minimum wage, meal periods and sleep times are excluded from hours worked under the for home care aides who work shifts of 24 hours or more. While the emergency regulation does not expressly codify the NYS DOL's "13 hour rule" requirements that the home care attendants be afforded eight hours of sleep, five of which are uninterrupted, and afforded three uninterrupted hours for meals, home care agencies may continue to follow these requirements for meal periods and sleep time. Notably, the requirements of the FLSA provide more flexibility for employers to pay home care aides for more than 13 hours, but less than 24 hours.

Importantly, the emergency regulation does not directly and expressly address the potential retroactive legal or cost exposure for home care agencies, and possibly managed care plans and the state, prompted by these court decisions. However, the Regulatory Impact Statement (RIS) provides a detailed analysis of the NYS DOL's authority to define "hours worked" and clearly reflects the intent that the regulation is designed to maintain status quo and merely codifies the Commissioner of Labor's correct interpretation of the regulation. This intent is further reflected in the analysis of the cost to implement the regulation where the conclusion is reached that there will be no cost to businesses through the adoption of the regulation, reflecting the intent to protect providers both prospectively and retrospectively. The RIS explains that the NYS DOL has accurately interpreted the statutory requirement to pay minimum wages for "each hour worked" through administrative interpretations, formal guidelines, and legal opinions, and that in NYS DOL's view, such guidance has appropriately been relied upon by the Department of Health and home care agencies employing "live in" home care attendants. As such, the clearly intended goal of the regulation was to have retroactive applicability, thereby nullifying the impact of the court decisions.

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[5] 29 C.F.R. § 785.22(b).
[6] 29 C.F.R. § 785.19.
[7] Id.

In sum, the inclusion of this analysis in the RIS is clearly intended to demonstrate that the NYS DOL had the authority to define "hours worked" for minimum wage requirements for home care attendants and correctly interpreted the NYS DOL regulation in its 2010 Opinion Letter No. RO-09-0169. While the language of the RIS does not provide foolproof protections against a claim for retroactive liability, it outlines the NYS DOL's position that all home care agencies acted under valid interpretations of minimum wage requirements issued by the NYS DOL under its authority to define "hours worked" in paying "live-in" home care attendants pursuant to the 13-hour rule.

Please contact us with any questions that you may have.

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"facility" for purposes of being designated a caregiver. After registering, a designated caregiver facility would be authorized to possess, acquire, deliver, transfer, transport, and administer medical marihuana on behalf of a certified patient. This would help to prevent patients from experiencing adverse events associated with abrupt discontinuation of a treatment alternative that may be providing relief for the severe debilitating or life-threatening condition.

Costs:

Costs to the Regulated Entity:

Facilities seeking to register as designated caregivers would incur nominal administrative costs in registering. Pursuant to PHL Section 3363(f), there is a $50 application fee for designated caregivers to register with the department. However, the department is currently waiving the $50 application fee for all designated caregivers, including facilities registering as designated caregivers.

Costs to Local Government:

The proposed rule does not require the local government to perform any additional tasks; therefore, it is not anticipated to have an adverse fiscal impact.

Costs to the Department of Health:

The Department anticipates an increased administrative cost to support facilities seeking to register as designated caregivers, however such increase would be minimal.

Local Government Mandates:

The proposed amendments do not impose any new programs, services, duties or responsibilities on local government.

Paperwork:

No paperwork will be required to be maintained, as the registration process for designated caregivers is all done electronically. A registry identification card will be provided to the facility. The facility will be responsible for maintaining the registry identification card at all times when medical marihuana is present at the facility for the certified patient. The facility may have its own paperwork related to internal policies and procedures for possession of the registry identification card by staff members.

Duplication:

The proposed regulations do not duplicate any existing State or federal requirements.

Alternatives:

The Department could have chosen to keep the status quo and not allow patients to designate facilities as designated caregivers. The Department could have also allowed certified patients to designate an individual within the facility to be a caregiver. However, these options are not viable since patients in facilities may be cared for by multiple staff members in the course of a day. Certified patients have severe debilitating or life-threatening conditions and the regulatory amendments would help to prevent adverse events associated with abrupt discontinuation of a treatment alternative that may be providing relief for certified patients in these facilities.

Federal Standards:

Federal requirements do not include provisions for a medical marihuana program.

Compliance Schedule:

There is no compliance schedule imposed by these amendments, which shall be effective upon publication of a Notice of Adoption in the New York State Register.

***Regulatory Flexibility Analysis***

No regulatory flexibility analysis is required pursuant to section 202-b(3)(a) of the State Administrative Procedure Act. The proposed amendment does not impose an adverse economic impact on small businesses or local governments, and it does not impose reporting, record keeping or other compliance requirements on small businesses or local governments.

Cure Period:

Chapter 524 of the Laws of 2011 requires agencies to include a "cure period" or other opportunity for ameliorative action to prevent the imposition of penalties on the party or parties subject to enforcement under the proposed regulation. The regulatory amendment authorizing the patients to designate facilities as designated caregivers does not mandate that a facility register with the medical marihuana program. Hence, no cure period is necessary.

***Rural Area Flexibility Analysis***

No Rural Area Flexibility Analysis is required pursuant to Section 202-bb(4)(a) of the State Administration Procedure Act (SAPA). It is apparent from the nature of the proposed regulation that it will not impose any adverse impact on rural areas, and the rule does not impose any new reporting, recordkeeping or other compliance requirements on public or private entities in rural areas.

***Job Impact Statement***

No job impact statement is required pursuant to Section 201-a(2)(a) of the State Administrative Procedure Act. It is apparent, from the nature of the proposed amendment, that it will not have an adverse impact on jobs and employment opportunities.

# Department of Labor

## EMERGENCY RULE MAKING

### Home Care Aide Hours Worked

**I.D. No.** LAB-43-17-00002-E
**Filing No.** 836
**Filing Date:** 2017-10-06
**Effective Date:** 2017-10-06

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

***Action taken:*** Amendment of sections 142-2.1(b), 142-3.1(b) and 142-3.7 of Title 12 NYCRR.

***Statutory authority:*** Labor Law, sections 21(11) and 659

***Finding of necessity for emergency rule:*** Preservation of public health, public safety and general welfare.

***Specific reasons underlying the finding of necessity:*** This emergency regulation is needed to preserve 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. As a result of those decisions, home care agencies may cease to provide home care aides thereby threatening the continued operation of this industry that employs and serves thousands of New Yorkers by providing vital, lifesaving services and averting the institutionalization of those who could otherwise be cared for at home. Because those decisions relied upon the Commissioner's regulation, and rejected the Department's opinion letters as inconsistent with that regulation, this emergency adoption amends the relevant regulations to codify the Commissioner's longstanding and consistent interpretations that such meal periods and sleep times do not constitute hours worked for purposes of minimum wage and overtime requirements.

***Subject:*** Home Care Aide Hours Worked.

***Purpose:*** To clarify that hours worked may exclude meal periods and sleep times for home care aides who work shifts of 24 hours or more.

***Text of emergency rule:*** Sections 142-2.1, 142-3.1 and 143.7 of 12 NYCRR are amended to read as follows:

§ 142-2.1 Basic minimum hourly wage rate and allowances.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) New York City for

(i) Large employers of eleven or more employees
$11.00 per hour on and after December 31, 2016;
$13.00 per hour on and after December 31, 2017;
$15.00 per hour on and after December 31, 2018;

(ii) Small employers of ten or fewer employees
$10.50 per hour on and after December 31, 2016;
$12.00 per hour on and after December 31, 2017;
$13.50 per hour on and after December 31, 2018;
$15.00 per hour on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties)
$10.00 per hour on and after December 31, 2016;
$11.00 per hour on and after December 31, 2017;
$12.00 per hour on and after December 31, 2018;
$13.00 per hour on and after December 31, 2019;
$14.00 per hour on and after December 31, 2020;
$15.00 per hour on and after December 31, 2021,

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester counties)
$9.70 per hour on and after December 31, 2016;
$10.40 per hour on and after December 31, 2017;
$11.10 per hour on and after December 31, 2018;
$11.80 per hour on and after December 31, 2019;
$12.50 per hour on and after December 31, 2020.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors, such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.

*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.*

§ 142-3.1 Basic minimum hourly wage rate.

(a) The basic minimum hourly wage rate shall be, for each hour worked in:

(1) New York City for

(i) Large employers of eleven or more employees

$11.00 per hour on and after December 31, 2016;
$13.00 per hour on and after December 31, 2017;
$15.00 per hour on and after December 31, 2018;

(ii) Small employers of ten or fewer employees

$10.50 per hour on and after December 31, 2016;
$12.00 per hour on and after December 31, 2017;
$13.50 per hour on and after December 31, 2018;
$15.00 per hour on and after December 31, 2019;

(2) Remainder of downstate (Nassau, Suffolk and Westchester counties)

$10.00 per hour on and after December 31, 2016;
$11.00 per hour on and after December 31, 2017;
$12.00 per hour on and after December 31, 2018;
$13.00 per hour on and after December 31, 2019;
$14.00 per hour on and after December 31, 2020;
$15.00 per hour on and after December 31, 2021,

(3) Remainder of state (outside of New York City and Nassau, Suffolk and Westchester counties)

$9.70 per hour on and after December 31, 2016;
$10.40 per hour on and after December 31, 2017;
$11.10 per hour on and after December 31, 2018;
$11.80 per hour on and after December 31, 2019;
$12.50 per hour on and after December 31, 2020.

(4) If a higher wage is established by Federal law pursuant to 29 U.S.C. section 206 or its successors. Such wage shall apply.

(b) The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be permitted to work or required to be available for work:

(1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or

(2) at any other time when he or she is free to leave the place of employment.

*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.*

§ 143.7 An hour.

The term an hour shall include each hour an employee is permitted to work, or is required to be available for work at a place prescribed by the employer, and shall include time spent in traveling to the extent that such traveling is part of the duties of the employee. However, a residential employee–one who lives on the premises of the employer–shall not be deemed to be permitted to work or required to be available for work:

(a) during such employee's normal sleeping hours solely because he or she is required to be on call during such hours;

(b) at any other time when he or she is free to leave the place of employment.

*Notwithstanding the above, the term an hour shall not be construed to include 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.*

***This notice is intended*** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire January 3, 2018.

***Text of rule and any required statements and analyses may be obtained from:*** Michael Paglialonga, NYS Department of Labor, State Office Campus, Building 12, Room 509, Albany, NY 12240, (518) 457-4380, email: regulations@labor.ny.gov

***Regulatory Impact Statement***

Statutory Authority: State Administrative Procedure Act (SAPA) § 202(6) and Labor Law §§ 21(11) and 659.

Legislative Objectives: In enacting the Minimum Wage Law (Labor Law Article 19) in 1960 the Legislature mandated that the minimum wage be paid "for each hour worked" (Labor Law § 652(1)), without defining that phrase (Labor Law § 651), and delegated authority to the Commissioner of Labor ("Commissioner") to promulgate regulations as she "deems necessary or appropriate to carry out the purposes of this article and to safeguard the minimum wage" (L. 1960, Ch. 619, § 2, at Labor Law § 652(2) & (4)), to order "such modifications of or additions to any regulations as he may deem appropriate to effectuate the purposes of this article" (Labor Law § 659(2)), and to investigate hours worked (Labor Law §§ 660(b)(1) & 661). While Labor Law § 659(2) provides for rulemaking after a hearing, emergency adoption of this rulemaking is authorized "[n]otwithstanding any other law" by SAPA § 202(6).

The regulations to be amended. In 1960, based on the Legislature's delegation of authority, the Commissioner promulgated a new Minimum Wage Order for Miscellaneous Industries and Occupations (currently codified at 12 NYCRR Parts 142 and 143) ("the Wage Order"). The Wage Order contains regulations that defined the term "An hour" and provided that the requirement to pay minimum wages expressly covers time "an employee is permitted to work, or required to be available for work at a place prescribed by the employer." The Wage Order's regulations explicitly recognized that such time shall not be deemed to include sleeping time of a residential employee "solely because he or she is required to be on call during such hours" (see 12 NYCRR §§ 142-2.1(b), 142-3.1(b) & 143.7, originally promulgated as Minimum Wage Order 11 (1960), at II.A.1 (Hourly rate) and III.A.1 (Hourly rate), and Regulations (for exempt nonprofits) at IV.7 (A hour), and published at NYCRR, Supplement 15 (1963) at 344-64).

Legislative expansions to cover workers in the home. Over the years, the Legislature expanded the scope of the Minimum Wage Law as applied to domestic service and home companions. The original 1960 enactment expressly excluded any individual "employed or permitted to work (a) in domestic service in the home of the employer" (L. 1960, Ch. 691, § 2). In 1972, the Legislature removed that exclusion and replaced it with an exclusion for "service as a part time baby sitter in the home of the employer; or someone who lives in the home of the employer for the purpose of serving as a companion to a sick, convalescing or elderly person, and whose principal duties do not include housekeeping" (L. 1971, Ch. 1165, § 1). Finally, in 2010, the Legislature removed the exclusion for in-home companions as part of the Domestic Workers Bill of Rights (L. 2010, Ch. 481 § 8).

Administrative interpretations accompany statutory expansions. The above-referenced legislative expansions in 1972 and 2010 were each preceded by Commissioner's interpretations in the late 1960s and early 1980s that construed the statutory exclusions of domestic service and companions "in the home of the employer" to be inapplicable to domestic service and companions who were employed by agencies and placed in the home of a client. Such interpretations were affirmed by the Board of Standards and Appeals and its successor the Industrial Board of Appeals, and eventually by the Courts (see e.g., Settlement Home Care v. Industrial Board of Appeals, 151 A.D. 580 (2d Dept. 1989)). As the scope of minimum wage coverage expanded through administrative interpretations and legislative enactments, the Commissioner continued to interpret the statutory requirement to pay minimum wages for "each hour worked" to exclude sleep and meal periods of various categories of newly covered workers who were employed by agencies to work in the home of a client for extended periods of time. Those interpretations were set forth in investigators' manuals, formal guidelines, legal opinions, and Commissioner's determinations starting in the early 1970s, and were relied upon by the New York State Department of Health and by private agencies that employed home care aides. While the Commissioner did not amend the Wage Order's regulations to expressly codify those interpretations, she did amend it in 1986 to provide for overtime to be calculated "in the manner and methods provided for in and subject to the exemptions of" the federal Fair Labor Standards Act (FLSA) (12 NYCRR §§ 142-2.2 & 142-3.2) and, in so doing, grew to increasingly look to, and rely upon, federal FLSA regulations interpreting hours worked (29 CFR Part 785) to address meal periods (29 CFR §§ 785.18-19) and sleeping time (29 CFR §§ 785.20-23) so that hours worked were calculated consistently at the state and federal level for overtime (and other) purposes.

Needs and Benefits: This emergency regulation is necessary to preserve 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 for the First and Second Departments that treat meal periods and sleep time by home care aides as hours worked for purposes of state (but not federal) minimum wage. Tokhtaman v. Human Care, LLC, Docket No. 3671 151268/16, 2017 NY

Slip Op 02759 (1st Dept. Apr. 11, 2017), motion to reargue and for leave to appeal denied, 2017 NY Slip Op 82713(U) (1st Dept. Aug. 15, 2017); Andryeyeva v. New York Health Care, Inc., 2017 NY Slip Op 06421 (2nd Dept. Sept. 13, 2017); and Moreno v Future Care Health Servs., Inc., 2017 NY Slip Op 06439 (2nd Dept. Sept. 13, 2017). Absent a conflict between the First and Second Departments, and a final judgement in any of these cases that would make them ripe to be heard by the Court of Appeals, the Commissioner must take action now to avert an impending crisis. Emergency adoption of this regulation is necessary for the preservation of the public health, safety, and general welfare to ensure that home care aides will be available to provide care for, and avoid the institutionalization of, those who rely on home care.

The purpose and intent of this rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation that compensable hours worked under the State Minimum Wage Law do not include meal periods and sleep time of home care aides who work shifts of 24 hours or more. While the Commissioner's interpretations regarding meal periods and sleep time have not been limited to home care aides, the current emergency is, and thus the necessarily limited nature of this emergency rulemaking should not be taken as evidence that the Commissioner interprets hours worked to include meal periods and sleep time for all others who work shifts of 24 hours or more. Rather, the Commissioner anticipates that regulations to codify the full scope of her interpretations regarding meal periods and sleep time can be appropriately pursued through the ordinary rulemaking process, after a public hearing and a full notice and comment period.

Costs: As this rule codifies existing Federal regulations and the Commissioner's interpretations, the Department estimates that there will be no costs to the regulated community, to the Department of Labor, or to state and local governments to implement this rulemaking.

Local Government Mandate: None. Federal, state and municipal governments and political subdivisions thereof are excluded from coverage under Part 142 by Labor Law §§ 651(5)(n) and 651(5)(last paragraph).

Paperwork: This rulemaking does not impact any reporting requirements currently required in either statute or regulation.

Duplication: This rulemaking does not duplicate, overlap, or conflict with any other state or federal requirements.

Alternatives: There were no significant alternatives considered.

Federal Standards: This rule keeps New York State in conformity with existing Federal standards involving working time contained in Federal Regulations 29 C.F.R. Part 785, as applied to meal periods and sleep time for home care aides who work shifts of 24 hours or more. There are no other federal standards relating to this rule.

Compliance Schedule: This emergency rulemaking shall become effective upon filing with the Department of State.

***Regulatory Flexibility Analysis***

Effect of Rule: The purpose and intent of this emergency rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation of Article 19 of the Labor Law and to make clear that the amended regulations 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 federal minimum wage laws and regulations for home care aides who work shifts of 24 hours or more. The Department anticipates this will have a positive impact on small businesses as it will eliminate any instability introduced by decisions recently issued by the State Appellate Divisions. See Tokhtaman v. Human Care, LLC, Docket No. 3671 151268/16, 2017 NY Slip Op 02759 (1st Dept. Apr. 11, 2017), motion to reargue and for leave to appeal denied, 2017 NY Slip Op 82713(U) (1st Dept. Aug. 15, 2017); Andryeyeva v. New York Health Care, Inc., 2017 NY Slip Op 06421 (2nd Dept. Sept. 13, 2017); and Moreno v Future Care Health Servs., Inc., 2017 NY Slip Op 06439 (2nd Dept. Sept. 13, 2017).

Compliance Requirements: Small businesses and local governments will not have to undertake any new reporting, recordkeeping, or other affirmative act in order to comply with this regulation.

Professional Services: No professional services would be required to effectuate the purposes of this regulation.

Compliance Costs: As this regulation codifies existing administrative interpretations relied upon by regulators and employers, the Department estimates that there will be no costs to the small businesses or local governments to implement this regulation.

Economic and Technological Feasibility: The regulation does not require any use of technology to comply.

Minimizing Adverse Impact: The Department does not anticipate that this regulation will adversely impact small businesses or local governments. Since no adverse impact to small businesses or local governments will be realized, it was unnecessary for the Department to consider approaches for minimizing adverse economic impacts as suggested in State Administrative Procedure Act § 202-b(1).

Small Business and Local Government Participation: The Department does not anticipate that this rule will have an adverse economic impact upon small businesses or local governments, nor will it impose new reporting, recordkeeping, or other compliance requirements upon them. Nevertheless, the Department will ensure that small businesses and local governments have an opportunity to participate in the rulemaking process. In connection with a final revision to the regulation, the Department will elicit input from small businesses and local governments during the public comment period, and through a publicly scheduled hearing in accordance with Labor Law §§ 659 and 656.

Initial review of the rule pursuant to SAPA § 207: Initial review of this regulation shall occur no later than the third calendar year in which it is adopted.

***Rural Area Flexibility Analysis***

Types and estimated numbers of rural areas: The Department anticipates that this regulation will have a positive or neutral impact upon all areas of the state; there is no adverse impact anticipated upon any rural area of the state resulting from adoption of this regulation.

Reporting, recordkeeping and other compliance requirements: This regulation will not impact reporting, recordkeeping or other compliance requirements.

Professional services: No professional services will be required to comply with this regulation.

Costs: As this regulation codifies the Commissioner's longstanding interpretation of Article 19 of the Labor Law, consistent with federal law and regulations, the Department estimates that there will be no new or additional costs to rural areas to implement this regulation.

Minimizing adverse impact: The Department does not anticipate that this regulation will have an adverse impact upon any region of the state. As such, different requirements for rural areas were not necessary.

Rural area participation: The Department does not anticipate that the regulation will have an adverse economic impact upon rural areas nor will it impose new reporting, recordkeeping, or other compliance requirements. Nevertheless, the Department will ensure that rural areas in the state have an opportunity to participate in the rulemaking process. In connection with a final revision to the regulation, the Department will elicit input from rural areas of the state during the public comment period, and through a publicly scheduled hearing in accordance with Labor Law §§ 659 and 656.

***Job Impact Statement***

Nature of Impact: The Department of Labor (hereinafter "Department") projects there will be no adverse impact on jobs or employment opportunities in the State of New York as a result of this emergency rulemaking. Rather, this regulation will help to limit or eliminate any negative impact on jobs from recent court decisions affecting the home care industry. This regulation amends existing regulations to codify the Commissioner's longstanding and consistent interpretation of Article 19 of the Labor Law and clarify that the amended regulations 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 federal minimum wage laws and regulations for home care aides who work shifts of 24 hours or more. The nature and purpose of this regulation is such that it will not have an adverse impact on jobs or employment opportunities.

Categories and numbers affected: The Department does not anticipate that this regulation will have an adverse impact on jobs or employment opportunities in any category of employment. This regulation will help to ensure the stability of the jobs of home care workers who work shifts of 24 hours or more in New York State. According to the Department's Division of Research and Statistics, there are an estimated 330,650 home care aides employed across the state.

Regions of adverse impact: The Department does not anticipate that this regulation will have an adverse impact upon jobs or employment opportunities statewide or in any particular region of the state.

Minimizing adverse impact: Since the Department does not anticipate any adverse impact upon jobs or employment opportunities resulting from this regulation, no measures to minimize any unnecessary adverse impact on existing jobs or to promote the development of new employment opportunities are required.

Self-employment opportunities: The Department does not foresee a measureable impact upon opportunities for self-employment resulting from adoption of this regulation.

Initial review of the rule pursuant to SAPA § 207: Initial review of this regulation shall occur no later than the third calendar year in which it is adopted.

***Assessment of Public Comment***

The agency received no public comment.