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TO: **Memo Distribution List**

LeadingAge New York

FROM: Hinman Straub P.C.

RE: Update on Recent Developments Regarding New York State Minimum Wages for 24-Hour/Live-In Aides

DATE: January 24, 2018

NATURE OF THIS INFORMATION: This is general information you might find helpful or informative.

DATE FOR RESPONSE OR IMPLEMENTATION: N/A

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THE FOLLOWING INFORMATION IS FOR YOUR FILING OR ELECTRONIC RECORDS:
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INTRODUCTION

On January 24, 2018, the New York State Department of Labor ("NYSDOL") published new 90-day emergency regulations (I.D. No. LAB-04-18-00002-E) (the "January 2018 Emergency Regulations"). These emergency regulations essentially continue NYSDOL's October 25, 2017 emergency regulations (the "October 2017 Emergency Regulations"), which clarify the minimum wage rules applicable to "home care aides" who work shifts of 24 hours or more ("24-Hour/Live-In Aides"). [1]

The October 2017 Emergency Regulations were challenged in an administrative proceeding brought on behalf of certain employee organizations in New York City. The administrative agency considering the challenge, the Industrial Board of Appeals ("IBA"), denied the challenge as discussed in detail below..

Broadly speaking, although recent developments have not changed the current regulatory environment allowing employers to follow the "13 Hour Standard" for aide compensation, the fight over the number of hours for which 24-Hour/Live-In Aides must be compensated under New York state law is likely to continue.

THE EMERGENCY REGULATIONS HAVE BEEN CONTINUED

As discussed in recent memoranda, NYSDOL published the October 2017 Emergency Regulations specific to the minimum wages of 24-Hour/Live-In Aides in response to state appellate court decisions that disagreed with NYSDOL's long-standing interpretation of its minimum wage rules.[2] The October 2017 and January 2018 Emergency Regulations clarify that

[1] The phrase "home care aide" is not defined in the emergency regulations but appears to have the same meaning as in the Home Care Worker Wage Party law. *See* Public Health Law § 3614-c (1) (d).

[2] The cases are *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). These cases are currently in discovery at the trial-court level. There is no motion or decision of record in these cases where the trial court interpreted the emergency regulations.

state minimum wage rules “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]). NYSDOL thus codified, on a temporary basis, its “13-Hour Standard,” which states that—provided minimum standards are met—24-Hour/Live-In Aides need not be compensated for hours of sleep and meals.[3] As discussed in prior memoranda, the emergency regulations effectively cut off employer liability for state minimum wage violations of the type alleged in *Tokhtaman*, at least for the period after October 6, 2017.[4]

Emergency rules expire after ninety (90) days, unless extended (State Administrative Procedure Act § 202 [6]). As such, on January 24, 2018, NYSDOL published the January 2018 Emergency Regulations, which are identical to those adopted in October 2017. NYSDOL has, in effect, continued the emergency regulations until at least April 4, 2018. In its notice, NYSDOL indicated that it intends to propose a permanent regulation, which will require a public hearing and public comments, at an unspecified point in the future (*see* NY Reg, Jan. 24, 2018, at 8).

<u>THE RECENT CHALLENGE TO THE OCTOBER 2017 EMERGENCY REGULATIONS WAS DENIED</u>

In December 2017, the Chinese Staff and Workers Association, National Mobilization Against Sweatshops, and Ignacia Reyes—all represented by attorneys from the Urban Justice Center in New York City—challenged the October 2017 Emergency Regulations before the IBA.

[3] Specifically, the employee must receive eight (8) hours to sleep, with at least five (5) hours uninterrupted, and three (3) hours for meals.

[4] Federal courts had agreed with NYSDOL that the 13-Hour Standard was valid, both before and after promulgation of the emergency regulations (*see de Carrasco v. Life Care Services, Inc.*, No. 17-cv-5617[KBF], 2017 WL 6403521, *7 [S.D.N.Y. Dec. 15, 2017]; *Bonn-Wittingham v. Project O.H.R. [Office for Homecare Referral], Inc.*, 16-CV-541 [ARR][JO], 2017 WL 2178426, *3 [E.D.N.Y. May 17, 2017]), so the potential for liability already appeared confined to state court litigation.

The IBA is an independent review board made up of five attorneys appointed by the Governor. Section 657 of the Labor Law grants the IBA authority to review and modify or revoke "[a]ny minimum wage order and regulation issued by [NYSDOL] pursuant to [Labor Law] article [19]."

On January 23, 2018, the IBA denied the challenge to the October 2017 Emergency Regulations (*see Chinese Staff and Workers Assn. v Commissioner of Labor*, Dkt. No. WB 17-002 [Jan. 23, 2018], *available at* http://industrialappeals.ny.gov/decisions/pdf/WB-17-002-Decision.pdf). The IBA's decision was based only upon jurisdictional grounds. It did not consider the merits of the October 2017 Emergency Regulations themselves. Essentially, the IBA concluded that the two statutes that give it authority to review NYSDOL regulations (Labor Law §§ 101 and 657) did not grant it the power to evaluate minimum wage emergency regulations, only permanent rules (*see id.* at 6-7).

The IBA's decision may be appealed to the Appellate Division, Third Department, within sixty (60) days. That Court reviews whether the IBA's decision "is 'contrary to law'" (*Matter of National Rest. Assn. v Commissioner of Labor*, 141 AD3d 185, 190 [3d Dept. 2016] [citation omitted]).[5]

It is possible that, if the IBA's decision is appealed, the Appellate Division could conclude that the IBA in fact had the power to decide the validity of the October 2017 Emergency Regulations. If so, the case would likely return to the IBA for resolution on the merits.

[5] The most recent appeal from an IBA minimum wage decision was resolved by the Appellate Division within six (6) months, which is relatively fast for an appellate court. *See Matter of National Rest. Assn.*, 141 AD3d at 188. An appeal from this IBA decision could be resolved in a similar amount of time, or perhaps longer.

IMPLICATIONS OF RECENT DEVELOPMENTS

Before the IBA, NYSDOL vigorously defended its October 2017 Emergency Regulation as both necessary for public policy reasons and consistent with decades of regulatory practice. It is therefore reasonable to expect that NYSDOL will continue to re-issue emergency regulations until it proposes a permanent rule. Consequently, the state minimum wage rules codifying the "13-Hour Standard" are unlikely to change unless NYSDOL loses in court.

Each time emergency regulations are re-issued, they could be challenged. The IBA in its decision stated that, in its view, because it lacked jurisdiction "judicial review . . . is not precluded by Labor Law § 103 (1)" (*Chinese Staff and Workers Assn.*, Dkt. No. WB 17-002, at 6). That statute normally bars court challenges to NYSDOL rules unless they begin before the IBA (*see Matter of Horn & Hardart Co. v Ross*, 58 AD2d 518, 519 [1st Dept. 1977], *appeal dismissed* 42 NY2d 1060 [1977]). The IBA thus invited future challengers to the emergency regulations to bring a CPLR article 78 proceeding in court, instead of starting at the IBA.

Accordingly, workers' advocates may challenge the emergency regulations in a court proceeding (unless the Appellate Division holds that the IBA can review emergency minimum wage regulations). The outcome of such a proceeding is difficult to forecast. As a result, the effect of the emergency regulations in state court minimum wage cases brought by 24-Hour/Live-In Aides remains somewhat uncertain.

Hinman Straub P.C. will continue to monitor these matters as the situation evolves. Please contact Sean M. Doolan, Joseph M. Dougherty, or David B. Morgen with any questions that you have at (518) 436-0751 or sdoolan@hinmanstraub.com; jdougherty@hinmanstraub.com; and dmorgen@hinmanstraub.com.