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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: September 28, 2018

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

DATE FOR RESPONSE OR IMPLEMENTATION: N/A

HINMAN STRAUB CONTACT PEOPLE: Sean Doolan; David Morgen; Kristin Foust; and Benjamin Wilkinson.

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

INTRODUCTION

On September 26, 2018, the New York State Supreme Court, New York County, invalidated the emergency regulations of the State Department of Labor ("NYSDOL"), which clarified the minimum wage rules applicable to "home care aides" who work shifts of 24 hours or more ("24-Hour/Live-In Aides").[1] As you may recall, beginning in October 2017, NYSDOL issued a series of Emergency Regulations which both clarified and confirmed that home care employers can continue to follow the "13 Hour Standard" for live-in home care aide compensation.[2] The Emergency Regulations were in response to a number of court decisions which questioned the NYSDOL interpretation of the live-in regulations.

The practical impact of adopting the regulation on an "emergency" basis was to allow the clarifying rule to go into effect immediately, instead of waiting for the end of the lengthier notice and publication process required pursuant to the State Administrative Procedure Act ("SAPA"). At some point after issuing the Emergency Regulations, NYSDOL is required to adopt a permanent regulation. Indeed, since the initial adoption of the Emergency Regulation, NYSDOL commenced the lengthier process of promulgating a permanent rule expressly codifying the "13 Hour Standard" into State minimum wage regulations.

In the most recent decision, the court ruled that, procedurally, NYSDOL had not established an "emergency" justifying adopting rules on an emergency basis under SAPA. Therefore, the regulation needed to be promulgated following the standard notice and public

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[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 "13 Hour Standard" permits compensation for 13 hours of a 24 hour shift, provided that the employee receives eight (8) hours to sleep, with at least five (5) hours uninterrupted, and three (3) hours for meals. Even before the Emergency Rules were adopted, this standard was articulated in a 2010 opinion letter by NYSDOL's counsel (see Opn RO-09-0169). However, NYSDOL had applied the 13 Hour Standard in enforcement proceedings involving home care agencies dating back to the 1980s (see Matter of Settlement Home Care, Inc. v Industrial Bd. of Appeals of Dept. of Labor of State of N.Y., 151 AD2d 580, 582-583 [2d Dept 1989]).

hearing process associated with adopting a regulation on a permanent basis. As a result, the court invalidated the Emergency Regulations, thereby reverting back to the uncertainty of the legality associated with the "13 Hour Standard" before the Emergency Regulations were issued.

The recent court decision does not directly impact the permanent rule which continues to be promulgated by NYSDOL, or address the validity of the "13 Hour Standard" itself. As you know, the "13 Hour Standard" itself will be addressed in a case that is currently pending before the State's high court, the Court of Appeals. As outlined below, NYSDOL has a number of options which will mitigate the impact of this court decision, at least until the underlying challenge to the "13 Hour Standard" is adjudicated by the Court of Appeals.

HISTORY OF THE EMERGENCY REGULATIONS AND CHALLENGES TO THEM

As discussed in recent memoranda, beginning in October 2017, NYSDOL published a series of 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 (the "Emergency Regulations").[3] The Emergency Regulations clarified that 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 (i.e. "emergency") 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. 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 (SAPA § 202 [6]). Through publication of subsequent identical emergency regulations, NYSDOL has, in effect, continued the emergency regulations until at least September 27, 2018.

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[3] 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). *Andryeyeva* is the subject of a pending appeal before the Court of Appeals, the State's highest court. The other cases are currently in discovery at the trial-court level.

[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.

In December 2017, the Chinese Staff and Workers Association, National Mobilization Against Sweatshops, and one or more individual home care aides challenged the October 2017 Emergency Regulations before the IBA. The IBA is an independent review board appointed by the Governor that has the authority to review NYSDOL rules (see Labor Law § 657).

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). 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 emergency minimum wage regulations, only permanent rules (*see id.* at 6-7). The IBA did not consider the merits of the Emergency Regulations themselves.

In May 2018, the same petitioners commenced a CPLR article 78 and declaratory judgment proceeding challenging the Emergency Regulations in Supreme Court, New York County.[5] As relevant here, the petitioners argued that the Emergency Regulations were not properly authorized under SAPA because there was no genuine "emergency". NYSDOL, represented by the Attorney General, opposed the petition.

On September 26, 2018, the Supreme Court (Rakower, J.) granted the petition and declared that the Emergency Regulations were invalid (*see Matter of Chinese Staff & Workers Assn. v Reardon*, Index No. 450789/2018 [Sup Ct, NY County] [attached as **Exhibit "1"**]). The relevant reasoning from the Court is reproduced below:

> "Here, after a review of the record including the July 2017 and December 2017 Notices [from the New York State Department of Health regarding *Tokhtaman* and related decisions] and hearing from [NYSDOL] at oral argument, the Court

[5] Pursuant to Labor Law § 657, the petitioners could have appealed to the Appellate Division, Third Department. They elected not to do so. It does not appear that NYSDOL argued in the article 78 proceeding that the petitioners' failure to appeal from the IBA's determination barred their subsequent court case.

> finds that the record does not support the finding of an emergency justifying the use of SAPA's administrative procedures for emergency rulemaking. Here, although [NYSDOL] claim[s] that the '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,' the record is devoid of any facts upon which to base a finding of 'immediate necessity, emergency or undue delay.' A mere need for the monitoring of the home care service industry in light of the Appellate Division rulings and a potential concern about a disruption is not sufficient to justify the use of SAPA's administrative procedures for emergency rulemaking. It does not constitute a situation where 'bad things are happening' as was the case in *Korean Am. Nail Salon Ass'n of New York, Inc. v Cuomo*.
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> Furthermore, [NYSDOL] knew that there may be an issue when litigation was commenced in 2011 challenging their 2010 opinion letter. Yet, [NYSDOL] chose to wait until after the Appellate Division decisions were rendered to promulgate the 'emergency' rulemakings rather than to pursue the normal rule making procedure. This further belies [NYSDOL]'s position that an 'emergency' arose in October 2017 that necessitated the promulgation of rules under SAPA 206(6)"

(Exh. 1, 8-9 [citations omitted]).

The Court's decision means that, as of today, the state of the law regarding the 13 Hour Standard is the same as it was before the Emergency Rules were issued. Consequently, there is some potential that, if a home health care agency with 24-Hour/Live-in cases is sued in state court for unpaid wages, it could be exposed to an adverse judgment for wages for sleep and meal periods. Notwithstanding the court decision, the State has a number of options which should, at a minimum, delay the decision from going into effect.

POTENTIAL FUTURE EVENTS THAT COULD ALLEVIATE RISKS

We have identified three potential scenarios that should alleviate the risk created by the decision in *Matter of Chinese Staff & Workers Assn. v Reardon*. Each is discussed below.

A. Appeal By NYSDOL

NYSDOL has 30 days to decide whether to appeal from the Court's order in *Matter of Chinese Staff & Workers' Assn. v Reardon*. If NYSDOL appeals, enforcement of the Supreme Court order will be automatically "stayed" while the appeal is pending (*see* CPLR 5519 [a] [1]).

The scope of the stay, however, may not cover the entire Order. Specifically, "the declaratory provisions of a judgment are not undeclared when a governmental party serves a notice of appeal therefrom" (*Matter of Pokoik v Department of Health Servs. of County of Suffolk*, 220 AD2d 13, 15 [2d Dept 1996]). Thus, the portion of the order declaring that the Emergency Regulations are invalid may not be automatically suspended or undone by a notice of appeal. The Appellate Court will need to define the scope of the stay by "exercise[ing] its inherent power to suspend the operation of the declaratory judgment itself pending the appeal" (*id.* at 16). The NYSDOL may need to file a motion to ensure that the entire decision is stayed. The filing of the notice of appeal, will, at a minimum, require the parties to address whether the entire Order is stayed and whether the Emergency Regulations remain valid.

B. Permanent Rulemaking

NYSDOL has proposed a permanent regulation (*see* NY Reg, Apr. 25, 2018, at 43-45). The proposed permanent regulation would add the following text to the applicable state minimum wage regulations:

> "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 an employee who works a shift of 24 hours or more."

(*id.* at 44). This language is essentially the same as that temporarily added by the Emergency Rules, but would apply to more industries than just home care.

The permanent regulation is not yet in effect. However, NYSDOL has allowed public comments and appears to have complied with the statutory public hearing requirements (*see* Labor Law § 659 [2]; https://www.labor.ny.gov/workerprotection/sleep-time.shtm). If the agency does not make substantial changes to the proposed regulation, it could publish a notice of

adoption making it a permanent rule at any time (*see* SAPA § 202 [5]). Such a rule would likely take effect 30 days after publication (*see* Labor Law § 659 [2]).

The permanent rule, if issued in its proposed form, would likely only apply to wage claims on or after the rule's effective date. It would, technically, not be applied retroactively. Although New York law allows regulations to be retroactive, "retroactivity is not favored in regulatory changes and regulations will not be given retroactive effect absent language requiring that result" (*Matter of Queens-Nassau Nursing Home v McBarnette*, 216 AD2d 715, 716 [3d Dept 1995], *lv denied* 87 NY2d 804 [1995]). Such language is missing from the rule in its proposed form. That said, the underlying regulation is clearly designed to be a clarification that confirms the NYSDOL historical interpretation of the 24-Hour/Live-in rules. Thus, for practical purposes, the permanent rule is designed to ensure that the 13 Hour Standard has always been valid.

C. *A Favorable Court of Appeals Decision in Andryeyeva*

The third, and likely most helpful outcome for agencies, would be for the Court of Appeals to reverse the decision in *Andryeyeva* that spurred the Emergency Rules. If the Court of Appeals overrules the Appellate Division in *Andryeyeva* and holds that the 13 Hour Standard was valid, the regulatory changes spurred by the state court decisions would likely be rendered unnecessary.

Federal courts have repeatedly predicted that

> "the Court of Appeals would not follow the reasoning of the Appellate Division in *Tokhtaman*, *Andryeyeva*, and *Moreno*, and would instead defer to the NY[S]DOL's long standing interpretation . . . to permit employers of home health care aides to deduct 11 hours from the count of compensable hours in a 24-hour shift provided that the aide is given eight hours to sleep, actually receives five uninterrupted hours of sleep, and receives three hours of breaks for meals"

(*Shillingford v Astra Home Care, Inc.*, 293 F Supp 3d 401, 417 [SD NY 2018]). However, that is simply a prediction. The probability of such an outcome remains uncertain.

D. *Summary*

It is likely that the options outlined above will each be exercised in sequence, meaning the State will first appeal the decision seeking to stay the effect of the court decision. We expect that the State will continue the process of adopting the regulation on a permanent basis. The Court of Appeals decision will likely come 1-2 months after oral argument in the case. Oral argument has not yet been scheduled but, based upon a typical schedule, will likely occur over the next several months.

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER** PART 6
Justice

Index Number : 450789/2018
CHINESE STAFF AND WORKERS
vs
REARDON, ROBERTA
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/25/18

_____, J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application,

CHINESE STAFF AND WORKERS ASSOCIATION, NATIONAL MOBILIZATION AGAINST SWEATSHOPS, IGNACIA REYES, CARMEN CARRASCO, HUI LING CHEN, MARIA GOTAY, and XIAO WEN ZHEN,

Petitioners-Plaintiffs,

For Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and Declaratory Judgment,

-against-

ROBERTA REARDON, in her capacity as the Commissioner of the New York State Department of Labor, and the NEW YORK STATE DEPARTMENT OF LABOR,

Respondents-Defendants.

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Index No. 450789/2018

Decision and Order

Mot. Seq. 1, 2

HON. EILEEN A. RAKOWER, J.S.C.

Petitioners are five home care aides who serve disabled and elderly clients and two not-for-profit organizations that represent the interests of home care aides and other workers.

Petitioners seek an order pursuant to Article 78 and CPLR § 3001 vacating and declaring null and void four emergency rulemakings promulgated in October 2017, January 2018, April 2018, and June 2018 by the New York State Department of Labor ("DOL") and its Commissioner Roberta Reardon (collectively, "Respondents"). These emergency rulemakings, which were issued in response to certain Appellate Division decisions, amend the Wage Order for Miscellaneous

Industries and Occupations, presently codified at 12 NYCRR parts 142 and 143 (the "Wage Order") to exclude sleeping and meal breaks from work hours for which home care attendants working 24-hour shifts in clients' homes are required to be compensated.

Respondents move pursuant to CPLR §§ 3211(a)(1) and (7) and § 7804(f) for an Order dismissing the Amended Verified Petition and Complaint.

Relevant Background

12 NYCRR §142-2.1(b) mandates that the minimum wage must be paid for each hour "an employee is permitted to work, or 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 during such hours" or "at any other time when he or she is free to leave the place of employment" (12 NYCRR §142-2.1[b][1], [2]).

On March 11, 2010, the DOL issued an opinion letter, advising that "live-in employees," whether or not they are "residential employees," "must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals" (N.Y. St. Dept. of Labor, Op. No. RO–09–0169 at 4 [Mar. 11, 2010]).

In or around 2011, individuals, who were employed as home care aides and assigned to work 24 hour shifts at their clients' residences, commenced litigation against their employers. They alleged that as non-residential home care aides, they did not fall within the exception that applied to residential employees and were entitled to be compensated for the full 24 hours worked. Three of the cases reached the Appellate Division.

In *Tokhtaman v. Human Care, LLC*, 149 A.D. 3d 476, 477 [1st Dept 2017], the First Department affirmed the trial court's denial of the defendants' motion to dismiss the Complaint. The First Department held that DOL's opinion letter conflicts with the plain language of the Wage Order because it failed "to distinguish between 'residential' and 'nonresidential' employees." (*Tokhtaman*, 149 A.D. 3d at 477). The Court therefore held that "if plaintiff can demonstrate that she is a nonresidential employee, she may recover unpaid wages for the hours

worked in excess of 13 hours a day." *Id.* Similarly, the Second Department also rejected the DOL's interpretation of the Wage Order in cases before them. *See Andryeyeva v. New York Health Care, Inc.*,153 A.D.3d 1216, 1217 [2nd Dept 2017]) (affirming trial court's decision granting plaintiffs' motion for class certification and rejecting defendants "contention that the DOL's opinion is in accord with the Wage Order); *Moreno v. Future Care Health Services, Inc.*, 153 A.D.3d 1254, 1254 [2nd Dept 2017].

In response to these decisions, Respondents promulgated the October 2017 Rulemaking on October 6, 2018. The October 2017 Rulemaking amended the Wage Order to codify Respondents' interpretation that "non-residential" home care aides were not entitled to be paid minimum wage "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." (NY Reg Oct. 25, 2017 at 6).

On December 7, 2017, Petitioners CSWA, NMASS, and Ignacia Reyes filed a Petition with the Industrial Board of Appeals ("IBA") challenging the October 2017 Rulemaking (the "IBA Petition"). Following a hearing on January 5, 2018, the IBA denied the IBA Petition on January 23, 2018 on the grounds that that it lacked jurisdiction over the matter.

As described in the Amended Petition, while the proceedings before the IBA were ongoing, the October 2017 Rulemaking lapsed on January 4, 2018. On January 5, 2018, Respondents promulgated a substantively identical rulemaking as the October 2017 Rulemaking. After the January 2018 Rulemaking lapsed on April 4, 2018, Respondents promulgated a substantively identical rulemaking on April 5, 2018. The April 2018 Rulemaking expired on June 3, 2018.

Petitioners filed their initial Petition and Complaint on May 4, 2018. After Respondents promulgated a substantively identical emergency rulemaking on June 3, 2018 following the expiration of the April 2018 Rulemaking, Petitioners filed an Amended Petition and Complaint to including additional allegations as to the June 2018 Rulemaking. As described in the Amended Petition, each of the four rulemakings is identical in substance to the original October 2017 emergency rulemaking, and each has expired.[1]

[1] Petitioners contend that Respondents have since filed and published a fifth Emergency Rulemaking in July 2018 that is set to expire on September 27, 2018.

The Amended Petition contains five causes of action. The first cause of action asserts that "Respondents promulgated the Emergency Rules without authority independent of SAPA." The second cause of action asserts that "Respondents failed to adhere to the substantive and procedural protections of the Labor Law and the Minimum Wage Act." The third cause of action asserts that the Emergency Rules "exceed the scope of Respondents' regulatory power and violate separation of powers principle." The fourth cause of action asserts that the Emergency Rules "are arbitrary and capricious." The fifth cause of action assert that the Emergency Rules "violate SAPA."

Respondents contend that they have validly promulgated the Emergency Rules pursuant to SAPA § 202 (6); the Emergency Rules do not contravene the Minimum Wage Act's requirements; and Respondents had a rational basis for finding emergent circumstances warranting their legislative rulemaking. Respondents further argue that they have "substantially complied" with the procedural requirements of SAPA.

Discussion

Respondents adopted the Emergency Rulemakings pursuant to State Administrative Procedure Act ("SAPA") section 202(6). SAPA 202(6) provides, in relevant part as follows:

> "Notice of emergency adoption. (a) Notwithstanding any other provision of law, if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and the compliance with the requirements of subdivision one of this section would be contrary to the public interest, the agency may dispense with all or part

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Petitioners "also challenge the validity of the July 2018 Rulemaking but have not yet sought leave to amend their petition to formally include such challenge in the present proceeding." (Petitioners' response to motion to dismiss, page 5, footnote 2).

> of such requirements and adopt the rule on an emergency basis."

SAPA 202(6)(d)(iv) provides that a notice of emergency adoption shall:

> "contain the findings required by paragraphs (a) and (c) of this subdivision and include a statement fully describing the specific reasons for such findings and the facts and circumstances on which such findings are based. Such statement shall include, at a minimum, a description of the nature and, if applicable, location of the public health, safety or general welfare need requiring adoption of the rule on an emergency basis; a description of the cause, consequences, and expected duration of such need; an explanation of why compliance with the requirements of subdivision one of this section would be contrary to the public interest; and an explanation of why the current circumstance necessitates that the public and interested parties be given less than the minimum period for notice and comment provided for in subdivision one of this section."

SAPA Section 202(6)(d)(iv) "requires, at a minimum, an agency seeking an emergency rule adoption to fully articulate in writing the circumstances which give rise to the adoption on an emergency basis so as to limit this method of rule making to genuine emergencies." (*Law Enf. Officers Union, Dis. Council 82 by Engelhardt v. State*, 168 Misc 2d 781, 784 [Sup. Ct., Albany County,1995]). Through this requirement, "the legislature was attempting to stop the practice of using emergency rule making to avoid the notice and comment period otherwise required by the SAPA." (*Id.*). "As stated in the sponsor's memorandum, '[u]nder this legislation, an agency would have to disclose the specific reason as to the need to adopt the emergency rule and why it was necessary to forgo the required notice and comment period that is required by SAPA.'" (*Id.*) (citing to Bill Jacket, L 1990, ch 850, Sponsor's Mem, Assemblyman Sanders, Assembly Bill 10271-A, at 3).

Courts have upheld emergency rule making under SAPA 202(6)(d) when "necessary for the preservation of the public health, safety or general welfare." *See Korean Am. Nail Salon Ass'n of New York, Inc. v. Cuomo*, 50 Misc. 3d 731, 735 [Sup. Ct., Albany County 2015]. In *Korean Am. Nail Salon Ass'n of New York,*

Inc. v. Cuomo, 50 Misc. 3d at 732, after the DOL undertook an investigation of nail salons that resulted in the finding of 116 wage violations at 29 nail salons, the New York Department of State ("DOS") adopted an emergency rule on September 4, 2015 that authorized the State to enforce a wage bond mandate. Upon a challenge brought by two trade groups representing Korean and Chinese owned nail salons in New York State, the court held "that respondents have sufficiently demonstrated that nail salon workers are being deprived of legally due wages and that immediate adoption of the September 4, 2015 emergency regulation was necessary for the preservation of the public health, safety or general welfare of nail salon workers." (*Id.* at 735).

In response to the requirements of SAPA 206(6)(d)(iv), Respondents provided the following statement in support of the Emergency Rulemakings:

> "The specific reasons underlying the finding of necessity are as follows:
>
> 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." (emphasis added).

At oral argument, Petitioners stated that they "do not challenge, in this proceeding, the ability of the Department of Labor to issue regulations that modified wage orders." (Transcript at 5:25-6:2). Specifically, they challenge "the manner in which the respondents have engaged in rule making ... [and] that a valid emergency exists." (Transcript at 7:21-23).

Based on the record before the Court, to justify the Emergency Rulemakings at issue in this case, Respondents relied on a July 14, 2017 Notice from the New York Department of Health ("DOH") to home health providers entitled "Services for Live-in Home Care." The Notice provided that in light of the First Department decision of *Tokhtaman* and other related decisions, "The Departments of Health (DOH) and Labor (DOL) have been monitoring these cases, and will continue to evaluate whether action may be needed to prevent unnecessary disruption to home care services in New York State."

The Notice further advised that "[p]ending a final resolution of this matter by the courts, or until notice is otherwise given, DOH and DOL expect providers to continue staffing and covering live-in cases in accordance with current Managed Care contracts, Medicaid agreements, MLTC Policy 14.08, and all applicable labor requirements." It further advised that "[l]ive-in cases should not be converted to 24-hour continuous split-shift care unless the individual meets the criteria for this higher level of care."

Respondents also relied on a December 22, 2017 letter to Commissioner Reardon from Andrew Segal, Director of DOH's Division of Long-Term Care, "RE: Home Care Aide Hours Worked – Emergency Rulemaking." In that letter, Segal wrote that "[i]t is DOH's understanding, based on conversations with DOL, that moving from a compensation arrangement based on at least 13 hours per day to one that is based on 24 hours per day would significantly increase labor costs for 24-hour live-in personal care aide services." Segal wrote, "A significant shortage in the availability of home care agencies to provide personal care services would endanger the health and safety of those receiving the services who no longer have a personal care aide." Segal further wrote:

> "Since the issuance of this guidance, the impact of the recent court rulings that formed the impetus for DOL's emergency regulation has become clearer. Continued input from MLTC plans, homecare agencies, individual Medicaid recipients, consumer advocates, and other groups has only reconfirmed DOH's concerns about the

> availability and continuity of personal care services, and 24-hour live-in personal care services in particular."

At oral argument, when asked about the basis for the emergency rulemaking, Respondents' counsel stated:

> "The record shows that the Department of Health..., as well as the Department of Labor were going to monitor the industry to make sure that wasn't disruption and chaos as a result" of the Appellate Division decisions ...So I think there is evidence in the record that there was going to be disruption or that disruption was likely enough so that it wasn't required to wait and see if there was an actual break-down; and the cases that we've cited, again the Korean American nail salon case is an example of a case where essentially the department of state said simply bad things are happening, therefore, we believe that as an emergency measure, prior to the effective date of legislation, we are going to put into effect an emergency rule." (Transcript at 18:2-16).

Here, after a review of the record including the July 2017 and December 2017 Notices and hearing from Respondents at oral argument, the Court finds that the record does not support the finding of an emergency justifying the use of SAPA's administrative procedures for emergency rulemaking. Here, although Respondents claim that the "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," the record is devoid of any facts upon which to base a finding of "immediate necessity, emergency or undue delay." (see *Law Enf. Officers Union*, 168 Misc. 2d at 784). A mere need for the monitoring of the home care service industry in light of the Appellate Division rulings and a potential concern about a disruption is not sufficient to justify the use of SAPA's administrative procedures for emergency rulemaking. It does not constitute a situation where "bad things are happening," as was the case in *Korean Am. Nail Salon Ass'n of New York, Inc. v. Cuomo*, 50 Misc. 3d at 735.

Furthermore, Respondents knew that there may be an issue when litigation was commenced in 2011 challenging their 2010 opinion letter. Yet, Respondents chose to wait until after the Appellate Division decisions were rendered to

promulgate the "emergency" rulemakings rather than to pursue the normal rule making procedure. This further belies Respondents' position that an "emergency" arose in October 2017 that necessitated the promulgation of rules under SAPA 206(6).

Wherefore, it is hereby

ORDERED that the Amended Petition is granted (Mot. Seq. 1); and it is further

ORDERED that the emergency regulations promulgated by Respondents on October 5, 2017, January 5, 2018, April 5, 2018, and June 3, 2018 amending the Minimum Wage Order for Miscellaneous Occupations and Industries (the "Emergency Rules") are declared null, void, and invalid; and it is further

ORDERED that Respondents and any of their agents, officers, and employees are enjoined from implementing or enforcing the Emergency Rules; and it is further

ORDERED that Respondents' motion to dismiss the Amended Petition and Complaint is denied (Mot. Seq. 2).

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: September 25, 2018

EILEEN A. RAKOWER, J.S.C.