

MEMORANDUM

TO:

FROM: Hinman Straub P.C.

RE: DOH Guidance on 24-Hour Home Care Employees

DATE: July 17, 2017

INTRODUCTION

On July 14, 2017, the New York State Department of Health (“DOH”) released guidance on minimum wage for 24-hour home care employees (“24-Hour Employees”) in light of the Appellate Division’s decision in *Tokhtaman v. Human Care, LLC* (149 A.D.3d 476 [1st Dep’t 2017]) (the “Informal Guidance”). The Informal Guidance states that home care providers shall “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.” Further, “[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.” This memorandum provides a summary of current regulations of wages paid to 24-Hour Employees and providers’ legal obligations in light of *Tokhtaman* and the Informal Guidance.

BACKGROUND ON THE MINIMUM WAGE REGULATION AND LEGAL CHALLENGE

1. Minimum Wage Regulations and Guidance

The New York State’s minimum wage regulation (12 NYCRR 142–2.1) provides that employers must pay the minimum wage for, among other things, time the 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, the New York State Department of Labor (“DOL”) issued an Opinion Letter interpreting the Residential Exception to require to apply to 24-Hour Employees, and providing that employers need to only pay 24-Hour Employees 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”). N.Y.S. Dept. of Labor Op. No. RO-09-0169 (Mar. 11, 2010). If, however, the employee does not receive five hours of uninterrupted sleep, then the eight-hour exclusion does not apply, and the employee must be paid for all eight hours. Similarly, if the employee does not receive three work-free hours for meals, then the employee must be paid for all three hours. Consistent with this Opinion Letter, DOH issued MLTC Policy 14.08 in 2014, which required that home care providers pay their “individual’s working on live-in cases,” I.e, 24-Hour Employees “a rate of payment that is based on at least 13 hours of care.”

2. *The Legal Challenge*

In *Tokhtaman*, the plaintiff was a home care attendant who alleged that she was owed minimum wage, overtime, and “spread of hours” pay because she was paid only 13 hours of a 24-hour shift. Specifically, the plaintiff alleged that the Residential Exception did not apply to her because “she maintained her own residence, and did not ‘live in’ the homes of [her employers’] clients.” 149 A.D.3d at 477 (internal quotation marks omitted). Because of this separate residence, the plaintiff claimed that she did not “live in” the home of her employer, and therefore was entitled to pay for all of the hours that she was “required to be available for work

at a place prescribed by the employer,” which she claimed was 24 hours per day, 7 days a week. Id. at 476. The defendant employer moved for dismissal, relying on the Opinion Letter.

The First Department, in affirming the denial of the motion to dismiss, held that the DOL Opinion Letter “conflicts with 12 NYCRR 142–2.1(b) insofar as the opinion fails to distinguish between ‘residential’ and ‘nonresidential’ employees, and should thus not be followed in this respect.” 149 A.D.3d at 477. The decision stated that if the plaintiff could “demonstrate that she is a nonresidential employee, she may recover unpaid wages for the hours worked in excess of 13 hours a day.” Id. This decision only a pre-discovery motion a motion to dismiss, and there was no legal determination regarding when a 24-Hour Employee who claims to maintain a separate residence is or is not covered by the Residential Exception for purposes of the 13 Hour Rule. Rather, the Appellate Division simply held that a particular complaint alleging that an employee both maintained her own residence and worked 168 hours per week could not be dismissed as a matter of law based upon the Opinion Letter.

THE INFORMAL GUIDANCE

In light of the *Tokhtaman*, DOH released the Informal Guidance advising home care providers of their ongoing staffing responsibilities. The Informal Guidance states, in pertinent part:

Pending a final resolution of this matter by the courts, or until notice is otherwise given, DOH and the Department of Labor 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. Live-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.

Further, employees who do not maintain a separate residence, and live on the premises of the employer, would not be covered by the *Tokhtaman* decision, and therefore would qualify for the Residential Exception, and may be paid based on the 13 Hour Rule.

The Informal Guidance emphasizes that providers should not convert live-in cases with one aide to continuous split-shift care with multiple aides unless the individual requires this higher level of care. MLTC Policy 15.09 defines continuous care directed personal assistance as:

the provision of uninterrupted care, by more than one personal care aide, for more than 16 hours in a calendar day for a patient who, because of the patient's medical condition, needs assistance during such calendar day with toileting, walking, transferring, turning and positioning, or feeding and needs assistance with such frequency that a live-in 24-hour personal care aide would be unlikely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep.

MLTC Policy 15.09(3)(c). By contrast, "Live-in 24-hour personal care services" or "Live-in 24-hour consumer directed personal assistance" is appropriate where the patient's condition is such that the 24-Hour Employee "would be likely to obtain, on a regular basis, five hours daily of uninterrupted sleep during the aide's eight hour period of sleep." MLTC Policy 15.09(3)(b) and (d). Accordingly, where the patient's needs permit this lower level of care, home care providers should not expect changes to reimbursement if they choose to staff live-in cases as continuous split-shift care simply based on the *Tokhtaman* decision.

EFFECTIVE DATE AND NEXT STEPS

DOH's Informal Guidance states that it applies "pending a final resolution of this matter in the Courts, or until notice is otherwise given." Hinman Straub will provide additional updates regarding any developments regarding *Tokhtaman* or similar lawsuits, or any release or changes of additional regulations or guidance on this matter. If you have any additional questions, please contact Joseph M. Dougherty at (518) 436-0751 or jdougherty@hinmanstraub.com.