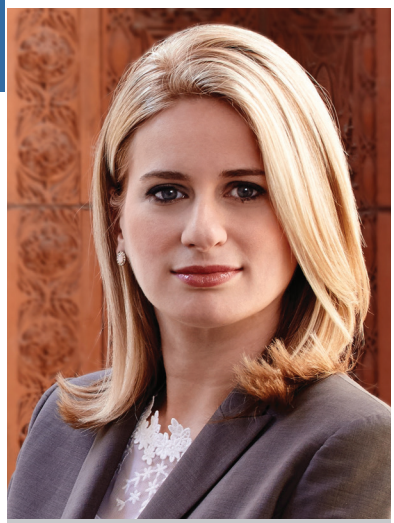
HOME CARE CLIENT ALERT

Hodgson Russ LLP ATTORNEYS

Employment Updates for Home Care Providers

November 5, 2018



Federal Overtime Law

The Wage and Hour Division of the U.S. Department of Labor recently announced plans to issue a proposed rule in March 2019 to update its "white-collar" exemptions regulations. The regulations specify which employees are exempt from overtime requirements. In 2016, the Obama administration proposed rules that would have required employers to pay a salary of at least $47,476 to workers who are classified as exempt. These regulations never went into effect and the current Secretary of Labor has indicated that a more reasonable annual salary requirement for exempt employees falls between $30,000 and $35,000. New York employers, however, might not be affected by these changes. In New York, effective December 31, 2018, the minimum salary level for exempt employees will be $1,125.00/week for large New York City employers, $900/week for employers in Westchester, Suffolk, and Nassau counties, and $832/week for employers in the rest of the State. To the extent the U.S. Department of Labor establishes a minimum salary threshold for exempt employees that is lower than the New York State minimum salary requirements for exempt employees, the higher New York State salary standards will govern.

New York City Earned Sick Time Amendments

The New York City Department of Consumer Affairs ("DCA"), which enforces the NYC Earned Safe and Sick Time Act, recently issued new guidance clarifying its interpretation and enforcement position concerning the Safe and Sick Time Act. Specifically, the new guidance states:

1. The term "domestic worker" does not include workers who are employed by an agency and provide services as an employee of that agency, regardless of whether they are jointly employed by an individual or private household in the provision of service. Thus, LHCSA HHA's and PCA's are not considered "domestic workers" and must receive safe and sick paid time off in accordance with the law. Under the Domestic Workers' Bill of Rights, domestic workers receive paid time off (including sick time) after one full year of employment, and they may be entitled to receive accrued but unused paid time off at the end of the year and upon termination of employment.

2. Employers must distribute written safe and sick leave policies personally when an employee begins employment with that employer, within 14 days of the effective date of any policy change, and upon employee request. An employer may not distribute the Notice of Employee Rights in lieu of distributing or posting its own written safe and sick leave policy.

3. The employer must use a delivery method that reasonably ensures that employees receive the written safe and sick leave policy. For example, an employer may provide this to each employee personally, by regular mail, by email or by delivery to the employee by including it in new hire materials if the employer gives those materials directly to the employee.

4. Employers are required to save a signed copy establishing the date that the written safe and sick leave policy was provided to an employee and proof that the notice was received by the employee.

Continued on Page 2...

CONTACT

Emina Poricanin
716.848.1336
eporican@hodgsonruss.com

PROFESSIONALS

Attorneys

Jane Bello Burke
Roopa Chakkappan
Reetuparna Dutta
Robert Fluskey, Jr.
Peter Godfrey
John Godwin
Timothy Hoover
Stephen Kelkenberg
Sharon Kelly
Michelle Merola
Sarah Miller
Kinsey O'Brien
Matthew Parker
Emina Poricanin
David Stark
Amy Walters
Margot Watt
Sujata Yalamanchili

Hodgson Russ LLP ATTORNEYS

Employment Updates for Home Care Providers

November 5, 2018

5. An employer's safe and sick leave policy must describe the law's two-pronged confidentiality requirements. First, an employer cannot require employees or their health care or other service providers to disclose personal health information or the details of the matter for which an employee requests leave. Second, an employer must maintain the confidentiality of the information obtained, unless the employee consents in writing or the disclosure is required by law.

6. Elective surgery, including organ donations, is no longer grounds for taking time off under the Safe and Sick Time Act.

In addition to issuing new guidance, the DCA amended some of its rules. In relevant part, the amended rules state that "written safe time and sick time policies [must appear] in a single writing." There is no explanation of what this requirement means, but it appears that the DCA requires employers to maintain a single policy related to sick and safe leave.

New Guidance Applicable to NYC Employees with Disabilities, Religious Needs & Pregnancy, Childbirth, or Related Medical Conditions

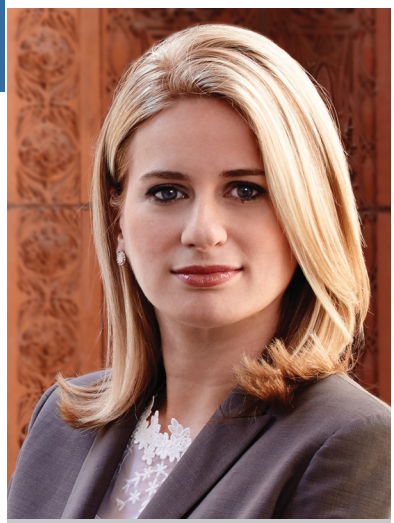
Under the NYC Human Rights Law, NYC employers must engage in "cooperative dialogue" with employees who may be eligible for a reasonable accommodations. Accommodations may have to be granted to employees for: (a) disabilities; (b) religious needs; (c) pregnancy, childbirth, or a related medical condition; and (d) victims of domestic violence, sex offense or stalking. The Law establishes a separate cause of action against employers who "refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time with a person who has requested an accommodation or who the covered entity has notice may require such an accommodation."

"Cooperative dialogue" is defined under the law as a "process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity." After an employer engages in the cooperative dialogue process, he/she must provide the person requesting an accommodation with a final written determination identifying any accommodation granted or denied.

The New York City Commission on Human Rights recently released guidance on disability discrimination that contains information on how a covered entity complies with the "cooperative dialogue" requirement.

According to the guidance, employers must engage in a cooperative dialogue "when the covered entity 'should have ... known' about the individual's disability, regardless of whether the individual requested an accommodation." The guidance states that an employer might be on notice of an employee's need for an accommodation "if an employer has knowledge that an employee's performance at work is diminished or that their behavior at work could lead to an adverse employment action and has a reasonable basis to believe that the issue is related to a disability."

Continued on Page 3...



CONTACT

Emina Poricanin

716.848.1336

eporican@hodgsonruss.com

Our Home Care Practice attorneys provide counsel to multiple home care agencies with respect to corporate, transactional, regulatory, reimbursement, compliance, wage and hour, wage parity enforcement, and litigation matters. With a broad understanding of the New York regulatory landscape, we help clients anticipate and respond to the increasingly complex rules governing the industry.

Hodgson Russ has been awarded a prestigious "Best Law Firms" National Tier 2 ranking by *Best Lawyers/U.S. News & World Report* in the Health Care Law category. Our Health Practice is recognized by *Chambers USA: America's Leading Lawyers for Business.*

Employment Updates for Home Care Providers

November 5, 2018

Where the employer is deemed to have a "reasonable basis" to believe that the employee's diminished performance may be disability-related, the employer "should not ask the employee if the employee has a disability." Rather, the employer should "ask if there is anything going on that the employer can help with, inform the employee that various types of support are available, including reasonable accommodations, to enable employees to satisfy the essential requisites of the job, and remind [the employee] of workplace policies and procedures for requesting a reasonable accommodation." If the employee declines to disclose his or her disability during that conversation, the employer has met its obligations to engage in the cooperative dialogue.

Employers must engage in the cooperative dialogue in good faith and "in a transparent and expeditious manner." The "dialogue may be in person, in writing, by phone, or via electronic means."

Whether an employer communicates with the employee in good faith throughout the cooperative dialogue will be assessed based on whether the employer: (1) has a policy informing employees how to request accommodations; (2) responds timely to the employee's request based on the "urgency and reasonableness" of the request; and (3) attempts to obstruct or delay the cooperative dialogue.

Westchester County Passes Paid Sick Leave Law

Effective March 30, 2019, full-time and part-time employees who work more than 80 hours per year in Westchester County will be eligible to receive paid sick leave. The Westchester County Ordinance provides paid leave for the following reasons:

- For an employee's mental or physical illness, injury or health condition; an employee's need for medical diagnosis, care or treatment of such illness, injury or health condition; or an employee's need for preventative care;
- Care of a family member with a mental or physical illness, injury or health condition; for the family member's need for medical diagnosis, care or treatment of such illness, injury or health condition; or for the family member's need for preventative care;
- Care of an employee or family member when it has been determined by public health authorities that the employee's or family member's presence in the community may jeopardize the health of others because of his or her exposure to a communicable disease; and/or
- Closure of the employee's place of business or a day care or elementary or secondary school attended by an employee's child where such closure is due to a public health emergency.

"Family members" include an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent; and the child or parent of an employee's spouse, domestic partner or household member (as defined in the Ordinance). Employers may require that employees use sick leave in minimum daily 4-hour increments, following which any additional sick leave needed in the same day must be made available in the smallest increment that the employer's payroll system uses to account for absences or use of other time.

Employees will earn sick leave under the Ordinance at a rate of 1 hour for every 30 hours worked, up to 40 hours per calendar year (or any other 12 month period used by the employer to calculate sick time). Similar to what the New York City Earned Safe and Sick Time Law requires, employers with five or more employees working in Westchester County must pay any sick leave at the employee's normal rate of pay. Employers with fewer than five employees are only entitled to receive unpaid leave. Accruals of sick leave begin at the start of employees' employment, but employees may be restricted from using any accrued leave for up to 90 days after they are hired. Where an accrual method is used to calculate earned sick leave, employees must be permitted to carry over available but unused sick leave for immediate use in the following year, though the maximum amount of sick leave to be used by employees in a given year may be capped at 40 hours. Alternatively, employers can satisfy the law's requirements and avoid having to track employee accruals by providing an employee with sick time equaling 40 hours or more at the start of each calendar year (or any other 12 month period used by the employer to calculate sick time), provided the frontloaded time can be used for the same purposes and under the same conditions as accrued sick time under the Ordinance.

Employment Updates for Home Care Providers

November 5, 2018

An employer that currently offers its employees paid time off (e.g., personal, sick and/or vacation days) that is equal to or greater than that required by the Ordinance can use such time to satisfy the Ordinance's requirements.

The Ordinance will not apply to employees covered by a valid collective bargaining agreement so long as the agreement: (i) expressly waives the provisions of the Ordinance; and (ii) provides for a comparable benefit in the form of leave, compensation, other employee benefits, or some combination thereof.

Employers are required to provide both current employees and new hires with a copy of the Ordinance along with "written notice of how the law applies to that employee." Such notice must be provided within 90 days of the effective date of the law (i.e., June 28, 2019) or at the commencement of employment, whichever is later. Employers also shall be required to display a copy of the Ordinance and a notice of rights poster in a conspicuous location accessible to employees. It is unclear whether the County plans to issue any form notices to satisfy these requirements.

Employers will be required to maintain records reflecting both the hours worked and sick hours accrued and used by employees for a period of three years.

The Westchester Ordinance provides employees with a private right of action for violations of the law. Employees may recover the greater of $250 or three times the wages that should have been paid for each instance of undercompensated sick time taken, and $500 for each instance where employees have been unlawfully denied requested sick time. Other available remedies include reinstatement and back pay, attorneys' fees, the costs of an administrative hearing, and other monetary and equitable relief.

Law Proposed Relating to Lactating Employees

The New York City Council has passed two bills that would require employers with four or more employees to provide lactation space for breastfeeding employees. If Mayor de Blasio signs these bills, they would be effective 120 days after signing.

The New York Labor Law already requires employers to provide reasonable break time to express milk in the workplace for up to 3 years following the birth of a child and to "make reasonable efforts" to provide a room or other location, other than a restroom, to express milk in private.

The first bill passed by the City Council would require covered employers to provide lactating employees with access to a lactation room and a refrigerator suitable for breast milk storage "in reasonable proximity" to the employee's work area. The bill defines a lactation room as "a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water." If providing a lactation room would cause an undue hardship on an employer, the bill requires the employer to engage in a cooperative dialogue with employees to determine what, if any, alternate accommodation(s) may be available, and to provide a **written** final determination to employees who request the accommodation.

The second bill passed by the City Council would require covered employers to develop and implement a written policy regarding the provision of a lactation room and to distribute this policy to all new employees upon hire.

If you have any questions about these developments, please contact any member of our Home Care Group.