

Home Care Developments

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New York DOL Seems Close to Finalizing New Labor Law Forms for Wage Parity Covered Agencies

Many home care agencies that are providing care in wage parity regions are preparing for the October 1 deadline, when new Labor Law standards will require those agencies to use new Notice of Pay Rate forms, and to modify their paystubs to account for certain wage parity-required reporting. There are some updates with respect to these upcoming legal changes.

First, please note that the DOL has not yet published a sample paystub that providers will have to use, or use as a guidepost on how and what details to provide in their paystubs to wage parity covered caregivers. This is clearly problematic, however, providers and their payroll vendors should be looking to the Notice of Pay Rate forms (more on that, below) as guidance on how much detail to provide in the paystub. If the DOL does not publish a new paystub form by the October 1 deadline, or the first payroll run after that October 1 deadline, providers and their payroll vendors should be prepared for strict compliance (based on the most conservative interpretation of the law) with the statutory language when issuing paystubs.

Second, the DOL seems to be gearing up to release the new Notice of Pay Rate form that providers in wage parity regions will be required to use, effective October 1, 2020, for newly hired employees. The DOL's website [HERE](#) now contains an inactive link to a 2-page "Notice and Acknowledgement of Pay Rate and Payday for Home Care Aides Wage Parity and Other Jobs." This link - albeit an inactive link - was created only recently. The fact that the form is going to be a two-page document suggests that the DOL might be using a standard prevailing wage Notice of Pay rate form. As discussed in our last alert, a standard DOL prevailing wage Notice of Pay Rate form is available on the DOL's website and could serve as a good guide on what employers should expect from the wage parity Notice of Pay Rate forms.

Thirdly, while the State has the discretion to postpone the above Labor Law changes, the establishment of a dedicated link on the DOL's website in recent days suggests that the DOL is close to finalizing its requirements regarding the (1) notice of pay rate forms and (2) paystub requirements for wage parity covered caregivers. Thus, a delay on the implementation of these requirements might be unlikely.

Please reach out to us if you have any questions about these obligations and how to best comply with them.

Presentation on Home Care Funding Opportunities

On September 15, 2020, Emina Poricanin, Esq., the founder of Poricanin Law, will be a presenter at the New York Home Care Association's annual Senior Financial Manager's Conference, where she will discuss how the last several months have brought new funding opportunities for providers and payors in New York's home care industry. From federal coronavirus relief funding (e.g., the Paycheck Protection Program and HHS funding) to the new Wage Parity spending requirements passed in the state budget, businesses in the home care space are juggling several, sometimes

Upcoming Event

September 15

From Wage Parity to PPP and the Cares Act Funds: How to Maximize and Comply with Government Spending Requirements

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conflicting, expenditure standards. Ms. Poricanin's session will review those requirements, answer commonly asked questions, and highlight tips and tools to maximize business use and expenditure of funds in order to comply with government requirements and conditions on the use of those funds

New US DOL Guidance, Plenty of Insights for Home Care

Earlier this week, the United States Department of Labor ("DOL") issued a "Field Assistance Bulletin" to address "Employers' Obligation to Exercise Reasonable Diligence in Tracking Teleworking Employees' Hours of Work." While the [Field Bulletin](#) extensively discusses teleworking employees' hours of work and the DOL's expectations for employers in those remote work settings, the DOL's standards and guidance is also instructive on how employers in the home care space should approach live-in and other cases where there are allegations that the employee performed unauthorized or unscheduled work (e.g., work during the evening) for which the employee is claiming entitlement to payment. For home care providers, there has been no shortage of class action lawsuits alleging that employees were not paid properly on live-in shifts, or other types of shifts. Thus, this Field Bulletin should be used by home care providers to improve any of their wage and hour practices, and as a shield in defending wage and hour lawsuits from caregivers who claim to have been underpaid.

The Field Bulletin starts with the premise that an employer is only responsible to pay for work hours - even if those hours were not authorized - if the employer had "actual or constructive" knowledge that the employee had worked those hours. Courts will consider whether employers should have acquired knowledge of such hours through reasonable diligence. And one way that an employer may exercise "diligence" to find out how many hours of work were performed is by providing a reasonable REPORTING procedure for non-scheduled work time, and then compensating employees for all reported hours of work, even those hours that were not authorized. Thus, this means that for live-in cases, it is not sufficient to assume that the aide is working 13 hours on every shift unless the aide calls in to the coordination department. The agency must create a clear and accessible system to report deviations from the expected 13-hour work schedule on live-in shifts. Failure to have such a process in place - and prove that the process existed - could doom a provider's wage and hour class action case.

The Field Bulletin also highlights that an employer must "exercise control and see that work is not performed if it does not want it to be performed." For remote employees who are overtime eligible (such as coordinators and other office staff, or caregivers), it is imperative for the employer to outline what work the employee should and should not perform while on a scheduled shift, as well as the hours of work. The employer must also clearly articulate in writing that any work performed beyond the assigned work hours has to be affirmatively reported to the employer, so that the employer knows how many hours of work to pay out to the employee. While employers can discipline employees work working in violation of any directives, work not requested but performed by the employee generally must be paid. In addition, and for good measure, employers should have timesheets that allow all employees to make these reports of extra work hours with each pay period. If the employee is prompted to report "extra" work on a weekly timesheet and fails to do so, it becomes much harder on the employee to later claim that they did not understand or know the process for reporting additional work hours.

Third and lastly, the Field Bulletin highlights this concept of a "reasonable method" to report work hours. While the methods may vary, depending on the employee classification, the DOL expects employers to have "reasonable process" for reporting hours, to clearly explain to employees how to report work hours, and not interfere or somehow discourage employees from reporting their full hours of work. At Poricanin, we have been involved in countless investigations, audits and lawsuits where workers claim not to understand the process for reporting work hours. Plainly written and user-friendly policies issued and explained at the outset of employment and reinforced during in-service can go a long way towards meeting employers' obligations to prove that they established clear and reasonable processes for employees to report their work time.

The above suggestions should be incorporated in home care providers' payroll practices and time keeping/reporting systems for caregivers, but also any other non-exempt workers who may be teleworking. If Poricanin can provide any assistance in this regard (e.g., auditing and repairing current payroll practices, drafting policies regarding wage and hour compliance, and providing training to office staff that is tasked with monitoring timekeeping), please let us know.



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