



DOH Reverses Position on Overtime Pay Under The Wage Parity Act

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Executive Summary: On November 2, 2015, the NYS Department of Health ("DOH") issued important notices affecting the wage and overtime obligations of New York City and Nassau, Suffolk, and Westchester County home care agencies. In addition to setting Total Compensation under the Wage Parity Act for March 1, 2016 – February 28, 2017, the DOH reversed its existing position that overtime pay does not reduce the additional and supplemental wage package due on each episode of care hour worked under the Wage Parity Act. This reversal of position has major ramifications for the home care industry in downstate New York.

What was the DOH's position on overtime? Until issuance of Dear Administrator Letters ("DALs") titled "Official Notice of Home Care Worker Wage Parity Minimum Rate of Total Compensation," on November 2, 2015, the DOH had said that, "(o)vertime was not included in the Total Compensation rate of \$14.09" under the Wage Parity Act." (*FAQ No. 7, Home Care Worker Wage Parity FAQs May 2014*). Under that interpretation, an agency servicing a WPA covered case in New York City was obligated to pay overtime wages for all hours over 40 in a workweek PLUS an additional wage and benefit package of \$4.09 (the "\$4.09 Package"). On and after the effective date of the U.S. Department of Labor's "Final Rule," October 13, 2015, this meant that an overtime episode-of-care hour under the WPA had a labor cost of \$15 in wages and \$4.09 Package, for a total cost of \$19.09.

What is the DOH's new position on overtime? Each of the Notices issued by the DOH on November 2, 2015, one for New York City and one for Nassau, Suffolk, and Westchester County home care agencies, expressly state that "FAQ number 7 is superseded by this notice." The Notices state further:

The Overtime premium pay (1/2 times the workers "regular rate of pay") that employers are required to pay for overtime hours under state and federal minimum wage laws may be used to satisfy the Total Compensation required under the wage parity law. (emphasis added)

This means, says the DOH, that "if the Total compensation rate is \$14.09, then the requirement to pay or prove \$14.09 is fully satisfied by payment of \$15, for that same hour of overtime." No longer must an agency servicing a WPA case in New York City pay the \$4.09 Package on top of \$15.00 for an overtime hour.

What questions does this raise for home care agencies?

1. If the actual cost to an agency for a WPA covered overtime hour as compared to a non-overtime hour has effectively been reduced to \$15 per hour, instead of \$19.09 per hour, will this reduction in the overtime premium to \$.91 be given more weight in deciding whether to provide a worker with overtime hours in order to retain that worker and worker's client and greater priority to "continuity of care" concerns?



2. If the DOH's "Notice Regarding Overtime Pay under Wage Parity," is, as written, "provided to *clarify* the extent to which overtime can be used to satisfy the Total Compensation requirements for a given hour of overtime" is this clarification effective retroactively?

3. If a home care agency has already paid WPA covered overtime hours at \$19.09 per hour, is there any recourse or future reduction in WPA \$4.09 Package obligations available to that agency?

If you have any questions regarding this Alert or would like our advice of your home care agency's particular facts and circumstances, please contact our Home Care Group members, [Stephen Zweig](#), [Philip Davidoff](#) or [Eric Su](#) in FordHarrison's New York City office at (212) 453-5900, or the FordHarrison attorney with whom you usually work. Also, please visit our website at www.homecareemploymentlaw.com.