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M E M O R A N D U M

TO: Anita Allen

FROM: Vorys, Sater, Seymour and Pease, LLP
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DATE: June 1, 2018

RE: Wage/Hour Compliance Implications for Paying New Medicaid Add On to Employees as a Bonus

Effective July 1, 2018, the Ohio Department of Developmental Disabilities (“ODODD”) will begin offering an incentive for experienced direct care staff who have also completed a specified amount of approved training. The details of the incentive are contained in ODODD regulations, which generally require the employee to have at least two years of experience and to have taken at least 60 hours of applicable training. Providers employing direct care staff who meet these criteria will be permitted to bill Medicaid at a higher rate for Homemaker Personal Care (“HPC”) services provided.

The add on was intended to provide additional compensation to direct care staff so as to help alleviate the recruiting challenges many providers have experienced in Ohio’s tight labor market. Accordingly, many (if not all) provider agencies in Ohio anticipate “flowing down” this higher billing rate to their staff, and adopting wholesale the requirements contained in the Ohio regulation to determine which agency staff may be eligible for additional compensation.

Currently, providers are assessing the best form in which to provide eligible staff the increased compensation intended by ODODD’s new regulation. One suggestion that has arisen

V

Legal Counsel

Anita Allen
June 1, 2018
Page 2

is to pay a bonus that is equal to \$1/hour for each hour the staff member performs HPC duties. A provider would pay the bonus less frequently than weekly (*e.g.*, on a monthly basis). Only eligible employees (*i.e.*, those who satisfy the ODODD regulatory requirements summarized above) would be eligible to receive the bonus. To assess the wage/hour compliance issues inherent in this approach, you have asked that we prepare this memorandum.

I. The “Regular Rate” and How it is Calculated When Certain Bonuses are Paid

The Fair Labor Standards Act (FLSA) requires that nonexempt employees receive overtime pay for any hours they work over 40 during a workweek. Overtime pay must be at least one and one-half times the employee’s “regular rate” of pay. For a nonexempt employee whose compensation during a work week consists solely of pay at a single hourly rate, the “regular rate” for that week will simply be that hourly rate. Thus, the regular rate for an employee who is paid \$10/hour for all hours in a work week and receives no additional compensation (such as a bonus) will be \$10, and the employee’s overtime rate will be 1.5 times \$10, or \$15 per hour.

Some employers supplement their nonexempt employees’ hourly pay by providing discretionary or non-discretionary bonuses. Discretionary bonuses do not affect the regular rate or overtime pay. In contrast, non-discretionary bonuses must be included when determining a nonexempt employee’s regular rate for purposes of determining overtime pay.¹ When a nonexempt employee receives a non-discretionary bonus, **the regular rate of pay is determined**

¹ Determining whether a bonus is discretionary is addressed in Section II of this memorandum.

V

Legal Counsel

Anita Allen
June 1, 2018
Page 3

by dividing the worker's total compensation for the workweek (including the bonus) by the total number of hours worked.² 29 C.F.R. § 778.209.

The following example demonstrates how the regular rate calculation works for a nonexempt employee in a week in which the employee is paid \$10/hour, works 50 hours, and receives a \$50 bonus:

$$\begin{aligned}(\$10 \times 50 \text{ hrs.}) + \$50 &= \$550 \text{ (total compensation)} \\ \$550 \div 50 \text{ hrs.} &= \mathbf{\$11 \text{ (regular rate)}}\end{aligned}$$

The employee's overtime rate in this example would be $1.5 \times \$11 = \$16.50/\text{hour}$, and the employee would receive $\$16.50 \times 10 \text{ (overtime hours)} = \165 in overtime pay for that week. If the employer had failed to include the non-discretionary bonus when calculating the regular rate, it would have paid the employee only \$15/hour ($\10×1.5) times 10 (overtime hours) = \$150, resulting in an underpayment of \$15 in overtime pay for the week. If the employee did not work any overtime during the week in which the non-discretionary bonus was received, there would be no need to calculate the regular rate for purposes of overtime pay.

Once the overtime pay is calculated, the employer can determine the employee's total pay for the week as follows:

Straight time pay:	$\$10 \times 40 \text{ hrs.} = \400
Overtime pay:	$\$11 \times 1.5 \times 10 \text{ hrs.} = \165
Bonus:	\$50
Total pay:	\$615

² It is important to note that pay for any time not worked is not included in this calculation. Examples of common employer policies that result in compensation for hours not worked are vacation, bereavement, sick, and holiday pay. In addition, any hours paid, but not worked, are not included in determining the employee's total hours worked in the workweek. For example, a non-exempt employee paid 8 hours of sick pay in a week, but who actually works only 40 hours, is not entitled to overtime pay. Of course, an employer could adopt a more generous policy, but this memorandum focuses only on what is legally required.

V

Legal Counsel

Anita Allen
June 1, 2018
Page 4

II. Discretionary vs. Non-Discretionary Bonuses

Because the FLSA requires that non-discretionary bonuses be included in the regular rate when calculating overtime pay, it is important for employers to determine whether bonuses paid to their employees should be classified as discretionary or non-discretionary. In order for a bonus to qualify as discretionary, the employer must retain discretion regarding both the fact of payment and the amount of the payment until a time very close to the end of the period for which the bonus is paid. With discretionary bonuses, the bonus payment, if any, is determined by the employer without prior promise or agreement, and the employee has no contract right, express or implied, to any amount. The key is that the employer has not created an expectation by employees that a bonus will be paid if certain conditions, standards, or goals are met. If a bonus can satisfy the foregoing test, it is considered discretionary and need not be included in the regular rate calculation for overtime pay. See 29 C.F.R. § 778.211. An example of a discretionary bonus would be a Christmas bonus where the employer has complete discretion over whether the bonus is paid and the amount of the bonus.

In contrast, if an employer promises in advance to pay a bonus or to calculate the amount of the bonus in a particular way, then the employer has abandoned discretion with regard to the bonus. Such a bonus is non-discretionary under the FLSA and, as noted above, must be factored into the regular rate when calculating a nonexempt employee's overtime pay for the period of time covered by the bonus.

V

Legal Counsel

Anita Allen
June 1, 2018
Page 5

The vast majority of bonuses paid by employers are non-discretionary. Most bonuses are paid for the purposes of rewarding better performance or productivity or the performance of certain types of work. To provide an incentive for these behaviors, the employer typically, in advance of paying out the bonus, announces the bonus, sets forth certain goals or standards for earning it, and/or has prepared a formula for determining the amount of the bonus. Taking any of these steps renders the bonus non-discretionary because the employer gives up discretion as to either the fact or amount of the bonus. Examples of non-discretionary bonuses include attendance bonuses, individual or group performance or production bonuses, bonuses for the quality, accuracy, or type of work performed, profitability bonuses, and retention bonuses.

III. Application of Relevant Wage/Hour Principles to Payment of the Competency-Based Medicaid Add On as Bonus

Under the principles described above, the bonus payment contemplated would quite likely be deemed non-discretionary. First, the employer would have a pre-determined formula for determining the amount of the bonus (*i.e.*, \$1 per HPC hour worked). Second, the bonus would presumably be announced to employees in advance so that they understood why this extra compensation was included in their pay checks. Third, there would be criteria used to establish which employees would be eligible for the additional bonus payment that, because they are set in regulation if not announced by the provider, will be known to employees in advance of working the HPC hours. Indeed, the criteria will serve as an inducement to employees to take the steps necessary to make themselves eligible for the additional money. These are the typical hallmarks of a non-discretionary bonus.

V

Legal Counsel

Anita Allen
June 1, 2018
Page 6

Because the suggestion providers are considering is to pay the bonus less frequently than weekly, the provider would also need to determine how to correctly pay the bonus and any additional overtime pay owed. The calculation will be more complicated than the one featured in Section I of this memorandum, where the bonus was paid on a weekly basis. The specific issue that must be addressed is that, when the employees were paid for each week of the bonus period, the bonus was not taken into account in calculating the regular rate for overtime purposes. Once the monthly bonus is calculated and paid, the employer is required to retroactively pay any additional overtime owed due to the amount of the bonus allocable to each week during the bonus period.

The following example helps illustrate these principles. Assume there are four weeks in the month and employee Mary, who earns \$10/hour, works the following hours in each of those four weeks:

Week 1: 40 hours worked, 10 of which are HPC hours.
Week 2: 45 hours worked, 15 of which are HPC hours.
Week 3: 38 hours worked, 20 of which are HPC hours.
Week 4: 50 hours worked, 15 of which are HPC hours.

Based on these assumptions, the additional overtime that must be paid would be determined as follows:

- Week 1 and 3 analysis: The employer would pay Mary a \$10 bonus for Week 1 and a \$20 bonus for Week 3. There would be no need to retroactively determine any additional overtime due as a result of the bonus for these weeks because Mary did not work any overtime hours in those weeks.
- Week 2 analysis: The employer would pay Mary a \$15 bonus for Week 2 for the 15 HPC hours. Because Mary worked five hours of overtime in Week 2, the employer also has to retroactively determine the additional amount of overtime pay Mary is owed for Week 2

V

Legal Counsel

Anita Allen
June 1, 2018
Page 7

due to the inclusion of the \$15 bonus in the regular rate. Fortunately, there is a simple formula under the FLSA for determining this additional amount due. It is: **[(Bonus Amount ÷ Total Hours Worked) x .50 x Overtime Hours = Additional Overtime Owed]**. Applying that formula to Week 2, Mary would be owed 83 cents of additional overtime pay: $[(\$15 \div 45) \times .50 \times 5 = \$.83]$.

- Week 4 analysis: The employer would pay Mary a \$15 bonus for Week 4 for the 15 HPC hours. Because Mary worked 10 hours of overtime in Week 4, she is owed additional overtime pay due to the inclusion of the \$15 bonus in the regular rate. Applying the formula set forth above to Week 4, Mary would be owed \$1.50 in additional overtime pay: $[(\$15 \div 50) \times .50 \times 10 = \$1.50]$.
- The employer would pay the additional \$2.23 (\$.83 + \$1.50) of overtime for Weeks 2 and 4 at the same time it pays the monthly bonus to the employee, for a total payment to the employee of \$62.23 for the month.

Please note that a monthly bonus does not line up well mathematically with the way that nonexempt employees are typically paid – on a weekly or bi-weekly basis. For that reason, it may be easier to pay the HPC bonus once every four weeks rather than monthly. However, if an employer would rather pay the bonus monthly, it will have to choose a formula for determining which work weeks fall within the “month.” For example, the employer could decide to pay the bonus for each work week that ends in a given month. Under that formula, the number of work weeks in a given “month” would vary between four and five.

Another issue relating to payment of bonuses is establishing in the bonus plan when the bonus is earned. If one of the purposes of the bonus is to encourage employees to remain employed with the employer, it would be best to set up the plan so that the bonus is not earned until the date of the pay check in which the bonus is paid. For example, under such a plan, if the monthly bonus for March were not paid until April 6, any employee who was not still employed as of that date would not earn the March HPC bonus. Alternatively, the plan could provide that

V

Legal Counsel

Anita Allen
June 1, 2018
Page 8

the bonus is not earned until the end of the month. Under such a plan, an employee would need to be employed through March 31 to receive the monthly bonus for March.

There is another reason why providers should include a provision in the bonus plan requiring employees to work until at least the end of the month in order to receive the bonus. The applicable FLSA regulation allows employers to delay paying overtime due on a bonus when the bonus calculation “may necessarily be deferred over a period of time longer than a workweek. In such a case the employer may disregard the bonus in computing the regular hourly rate until such time as the amount of the bonus can be ascertained.” 29 C.F.R. § 778.209(a). If the bonus is simply an extra \$1 per hour for each HPC hour worked, with no additional stipulation, then the bonus could be “ascertained” on a weekly basis. A delay in paying overtime, therefore, could throw into doubt the ability of a provider to rely upon the regulation permitting deferral of the timing of payment of the overtime due on the bonus, and arguably of the bonus itself, exposing the provider to FLSA-related compliance risks.

Finally, we note that there may be a number of different options for providers desiring to pass along to employees some or all of the competency-based add on. While we have limited our discussion to the bonus structure suggested above, many different bonus structures may be possible. Indeed a non-bonus approach might also be feasible (*e.g.*, a different base rate for eligible employees). In that case, the calculations described herein may be different or potentially less administratively burdensome, but ultimately the provider will need to address the overtime pay issues in some fashion. Individual providers should obtain guidance from qualified

V

Legal Counsel

Anita Allen

June 1, 2018

Page 9

wage/hour counsel to address their specific situation and the mechanism selected to provide the additional compensation.