

Update

Updates on Recent Developments in Employment Law for the Home Care Industry

April 2021

Hi Friends and Clients! Having somewhat settled into the new shop, we wanted to provide you with some news on recent developments that we think may be important to you.

As I am sure you have heard, President Biden's Infrastructure Plan proposes \$400 Billion to go to the Home and Community Based-Services programs operated through Medicare. This would be a substantial increase over current funding and appears to be championed by the SEIU. If the PRO Act becomes law (more on this below), we certainly expect to see much more union organizing in this space - including spillover into private pay agencies. At the same time, we also expect that the infusion of new money may lead to more consolidation and deals because private equity and other investors may see significant upside potential. So much more to come on that!

Last month the American Rescue Plan Act of 2021 became law. Many of you have been burdened with added difficulties in recruiting caregivers due, in part, to the stimulus checks caregivers received. We also wanted to highlight a few other provisions that may impact you:

1. FFCRA paid leave remains a voluntary option for employers with 500 or fewer employees (it became optional starting January 1, 2021, as part of the Consolidated Appropriations Act of 2021 that was enacted on December 27, 2020). For employers that opt-in,

the substantive provisions have expanded in the following ways:

- Effective April 1, 2021, FFCRA leave is available for employees who are unable to work because they are obtaining a COVID-19 vaccine, or are recovering from side effects of receiving the vaccine.
 - Effective April 1, 2021, FFCRA leave also is available for employees seeking or waiting for the results of a diagnostic test or awaiting a medical diagnosis.
 - Paid family leave increases from 10 to 12 weeks.
 - Employee leave banks reset to zero on April 1, 2021 (but end on September 30, 2021).
2. Certain individuals will be eligible for up to \$300 in Pandemic Unemployment Assistance (PUA) through September 6, 2021.
 3. Employees involuntarily terminated who elect COBRA coverage will be eligible for a 100% COBRA subsidy between April 1, 2021 and September 30, 2021. Employers must fund this subsidy and then seek reimbursement much like the FFCRA. Employers first may raid the funds set aside for their portion

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of the FICA Medicare contributions. If that reserve is depleted, then a request may be made to the IRS for an advance. Employers must provide notice of this new benefit either in their COBRA election notice or in a separate document (a model notice is available [here](#)).

4. As you know, the \$15 minimum wage didn't make it into the final bill, but we should expect this to come back soon. It is a significant initiative of the new administration.

The PRO Act passed in the House on March 9. Key provisions include:

- Nullify arbitration agreements and class-action waivers
- Adopt California's ABC test
- Make it easier to establish joint employment
- Nullify right-to-work laws
- Allow unions to obtain employee personal contact information

Our understanding is that this legislation would not likely pass in the Senate unless the filibuster were eliminated. It is unclear whether that will happen. There has been a push on the few Democratic holdouts to encourage them to agree to terminate it. But Joe Manchin (D-WV) stated publicly, including in an opinion piece published in the Washington Post last week, that he would not vote to eliminate or weaken the filibuster. Again, more to come on this front!

In a notable development in the unemployment space, the DOL has now stated if an individual refuses to work because the worksite is not in compliance with local, state or national health and safety standards directly related to COVID-19, then that individual may collect **either** state unemployment benefits **or** the \$300 PUA benefit (note, they won't be eligible for both). This, of course, may make hiring even more difficult.

Home care agencies also should continue to remain vigilant on wage and hour compliance. Just last month, the DOL announced two large settlements

with home care agencies in Pennsylvania. One agency agreed to pay \$1.6 million to employees that it had misclassified as independent contractors. Another agency agreed to pay over \$2.1 million for failure to pay overtime. These settlements demonstrate that the DOL is still very much targeting this industry and that you need to make sure your operations are in compliance with the requirements of both federal and state law.

Finally, I wanted to give you a quick peek behind the curtain of our operation. For over a year now, our team has started each weekly meeting reciting our purpose, mission, and values. We think it makes sense for you, too, to know what they are:

Purpose: Build a bridge between those who can help and those who need help.

Mission: To be the first name a client thinks of for legal needs in the franchise and home care industries, by providing clients with an unsurpassed customer experience and creating an environment that attracts and keeps the best talent.

Values:

- Top Notch Client Service
- Accountability to Group
- Trust-based Relationships
- Mutual Success

It is very much our privilege to assist you in providing such a vital service to the elderly and frail in our society. Please help keep us accountable and together we will do great things!

