Legal Update Article

New York High Court Upholds State Labor Department Interpretation of 'Live-In' Home Health Employee Rule

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The New York Department of Labor's (NYDOL) longstanding interpretation of its wage order as applied to the work hours of non-residential employees performing 24-hour (so-called "sleep-in" or "live-in") shifts has been upheld by the New York Court of Appeals, to the relief of the state's home healthcare industry. *Andryeyeva v. New York Health Care, Inc.*, No. 11, and *Moreno v. Future Care Health Servs., Inc.*, No. 12, 2019 N.Y. LEXIS 617 (N.Y. Mar. 26, 2019).

Under the Miscellaneous Wage Order, a non-residential home health attendant working a 24-hour shift can be paid for 13 hours of work, provided he or she is afforded at least eight hours (and actually receives at least five uninterrupted hours) for sleeping, and is afforded at least three hours for consuming meals or performing other personal tasks. Where those conditions are met, the 11 hours (maximum) corresponding to the sleep and meal break time need not be paid simply because the attendant is required to remain at the client's home throughout the shift.

Thus, as set forth in a series of opinion letters culminating in a 2010 NYDOL Opinion Letter discussed in the Court's ruling, attendants who are provided such personal time need only be paid for 13 hours of a 24-hour shift. In so concluding, the Court reversed the decisions of two intermediate appellate courts, both of which had rejected the NYDOL's interpretation, holding instead that such non-residential attendants must be paid for the entire 24-hour on-premises shift, regardless of what the attendants are doing (or not doing) during that time.

Background

As it pertains to home health care attendants, New York's Labor Law regulations for the "Miscellaneous" industries generally provide that "the overtime rate shall be paid for each workweek for working time over 40 hours for non-residential employees and 44 hours for residential employees," the latter of which are defined as those "who live[] on the premises of the employer." Wage Order No. 11 (the wage order at issue) further provides:

> The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer .... However, a residential employee – one who lives on the premises of the employer — shall not be deemed to be permitted to work or required to be available for work (1) during his or her normal sleeping hours solely because he is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment.

12 NYCRR § 142-2.1[b].

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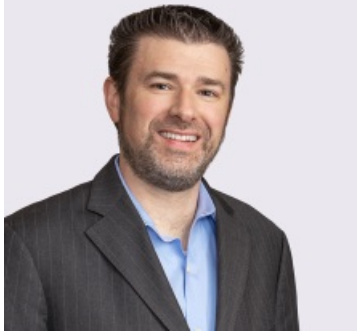

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Related Services

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In 2010, the NYDOL issued an Opinion Letter interpreting this Wage Order and, in the relevant portion, stated that, as a matter of policy, "live-in employees must be paid not less than for thirteen hours per twenty-four hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals." If the health care attendant does not receive these minimum, uninterrupted breaks, he or she must be paid for the entire eight, and/or three additional, hours accordingly. The Opinion Letter made clear that this policy applied to all employees who fell under the Wage Order and were performing a 24-hour shift, regardless of whether they were "residential" or "non-residential," and reiterated the NYDOL's view as set forth in numerous prior letters and other correspondence dating back to at least 1998.

Lower Court Decisions

In *Andryeyeva* and *Moreno,* the plaintiffs were employed as home health care attendants for their respective employers' elderly and disabled clients. The attendants regularly worked 24-hour shifts at the clients' homes, yet were paid for less than the entire 24-hour shift.

In both cases, the plaintiffs filed class action lawsuits, claiming that because they maintained separate residences outside of the clients' homes, they were "non-residential" employees to whom the Opinion Letter's sleep and meal break exceptions were inapplicable. The employers countered that the plaintiffs were properly paid, relying on the 2010 Opinion Letter's application of the sleep and meal break exceptions to *all* live-in employees. In *Andryeyeva,* the trial court granted the plaintiffs' motion for class certification and the employer appealed, while the trial court in *Moreno* denied the plaintiff's class certification and the plaintiffs appealed.

In opinions issued concurrently in September 2017, the Supreme Court of New York, Appellate Division, Second Department, affirmed the grant of class certification in *Andryeyeva* and reversed the denial of certification in *Moreno,* agreeing with the plaintiffs that the sleep and meal break exceptions were inapplicable to "non-residential" employees and that the NYDOL's failure to distinguish between "residential" and "non-residential" employees was "neither rational nor reasonable" because it conflicted with the plain language of the Wage Order. Accordingly, the intermediate appellate court held, the plaintiffs were "entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals." The Second Department's decisions were in alignment with an earlier 2017 decision from the First Department, *Tokhtaman v. Human Care, LLC,* 149 A.D.3d 476 (N.Y. App. Div. 1st Dep't Apr. 11, 2017).

High Court Decision

Reversing the intermediate appellate court, the Court of Appeals first noted that its review of the NYDOL's interpretation of the Wage Order "is quite circumscribed. As a general rule, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" as long as it is not "irrational or unreasonable." This is so, added the Court, "because, having authored the promulgated text and exercised its legislatively delegated authority in interpreting it, the agency is best positioned to accurately describe the intent and construction of its chosen language."

The Court went on to state that "[w]hen an agency adopts a construction which is then

followed for a long period of time, such interpretation is entitled to great weight and may not be ignored." To this end, the 2010 Opinion Letter was "only a recent articulation in a long line of official statements by [the NY]DOL explaining its general policy towards compensable work for 24-hour shift employees," as for 50 years, the agency consistently had interpreted the Wage Order as including "'up to 8 hours of sleeping time … as not being hours worked' within the meaning of the Wage Order, if certain conditions were met." Among the agency's statements on the issue was a 1998 letter from the Labor Commissioner adopting the same position as set forth in the Opinion Letter, without distinguishing between "residential" and "non-residential" live-in employees performing 24-hour shifts.

Moreover, the Court of Appeals noted, because the Wage Order does not define what it means for an employee to be "required to be available for work at a place prescribed by the employer," there was nothing irrational or unreasonable in the NYDOL's interpretation of the term "being available for work," when "applied to employees assigned to 24-hour shifts (including home health care aides), to exclude up to 11 hours for sleep and meal breaks from compensable hours, based on [the NY]DOL's understanding that these are regularly scheduled substantial periods of assignment-free personal time." The fact that, had they been in the NYDOL's position, the plaintiffs or the lower courts may have interpreted this phrase differently in the first instance did not itself render the agency's interpretation irrational or unreasonable, the Court said.

Furthermore, if the intermediate appellate court's conclusion was correct that the Wage Order's phrase "required to be available for work at a place prescribed by the employer" meant the entire 24-hour shift necessarily was compensable regardless of what the employee was (or was not) doing during the shift, then the first half of the phrase — "required to be available for work" — would be superfluous, because the latter half of the phrase would suffice to impose such 24-hour compensability. In addition, the Court of Appeals noted that the NYDOL's interpretation made the Wage Order consistent with the view adopted under federal wage and hour law, thereby "reflect[ing] the Commissioner's interest in conforming state and federal guidance on the proper calculation of compensable hours."

Although the Court of Appeals concluded that the NYDOL's interpretation of the Wage Order must be upheld, it remanded the cases for a determination as to whether class certification was still potentially appropriate on other grounds, given the plaintiffs' allegations that, even if the Wage Order's sleep and meal break exceptions applied, they and others were routinely denied such breaks and therefore were entitled to compensation for the entirety of many 24-hour shifts.

The Court's determination preserves the 13-hour rule regarding sleep and meal break time as to "resident" and "non-resident" employees alike. The determination also provides welcome relief to New York's vast home healthcare industry, the viability of which the lower court cases called into question. Compliance with the 13-hour rule remains paramount.

If you have any questions about this or any other wage and hour issue, please consult with the Jackson Lewis attorney(s) with whom you regularly work.

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