

## **New York Court of Appeals Upholds Thirteen Hour Rule for Home Health Aide Pay**

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On March 26, 2019, the New York Court of Appeals upheld the state Department of Labor's (the "DOL") so-called "13-hour rule" governing payment of home health care aides that work 24 hour shifts. In a closely-watched decision with significant ramifications for the state's home health industry, New York's highest court reversed two 2017 appellate decisions that had overturned the DOL's 13-hour rule and caused substantial uncertainty for home health providers throughout the state. In short, the New York Court of Appeals confirmed that New York home health care aides may be paid for 13 hours of a 24 hour shift, as long as the aides are given eight hours of sleep time (with five of those being uninterrupted hours) and three hours of meal breaks.

As background, in New York home health aides that work 24 hour shifts have been treated as "live-in employees" for purposes of New York's Minimum Wage Order regulation (the "Wage Order"). Under the DOL's interpretation of the Wage Order, employers were not required to pay an aide for each hour of a 24 hour shift as long as the aide was given up to eight hours of sleep time (with at least five of those hours uninterrupted) and three hours for meal breaks. The DOL most recently affirmed its interpretation via an opinion letter issued in March 2010, which states in pertinent part that "it is the opinion and policy of this Department that live-in employees must be paid not less than for 13 hours per 24 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." This recognition of the 13-hour rule for live-in employees was consistent with positions taken by the DOL in previous decades.

In recent years a number of home health aides have brought class action suits against employers seeking to challenge DOL's interpretation of the Wage Order, and therefore seeking payment for all 24 hours of a live-in shift. In 2017, courts in the First and Second Departments of the New York Appellate Division affirmed trial court decisions overturning DOL's interpretation of the Wage Order. In *Andryeyeva v. New York Health Care, Inc.*, the Second Department of the Appellate Division held that DOL's interpretation of the Wage Order was "neither rational nor reasonable, because it conflicts with the plain language of the Wage Order." In support of its determination, the Second Department noted that live-in employees were required to be present in patients' homes and perform services as needed, and therefore were "available for work" at all times, regardless of sleep or meal

breaks. Similarly, in Moreno v. Future Care Health Services, Inc., the Second Department held that the DOL's 13-hour rule "conflicts with the plain meaning" of the Wage Order, and therefore live-in aides were entitled to be paid for every hour of a 24 hour shift. And the First Department held in Tokhtaman v. Human Care, LLC that the DOL's 13-hour rule conflicted with the plain meaning of the Wage Order.

In response to the appellate decisions overturning the 13-hour rule, suits alleging violations of the Wage Order seeking back-pay and other damages have been filed against many home health providers in New York, potentially exposing the industry to extensive financial liabilities. In this case, the New York Court of Appeals consolidated the Andryeyeva and Moreno cases to determine in part if the Appellate Division "erroneously disregarded DOL's interpretation" of the Wage Order. In its decision, the Court of Appeals held that the DOL's interpretation of the Wage Order does not conflict with the "plain language" of the Wage Order "nor is it an irrational or unreasonable construction of the Wage Order" as applied to home health aides working 24 hour shifts. The Court characterized the DOL's interpretation as reflecting the DOL's "specialized knowledge of labor law's evolving application to domestic workers and the home health care industry [and] expertise in handling labor law violations." In reaching its decision upholding the DOL's interpretation, the Court noted that "this interpretation of the Wage Order is similar to the federal government's guidance on the minimum compensable hours for 24-hour shift employees under the Fair Labor Standards Act."

The Court ultimately concluded that "the Appellate Division failed to afford adequate deference to DOL's interpretation of the Wage Order" and reversed the orders of the Appellate Division. In accordance with its holding, the Court remanded the Andryeyeva case back to the trial court, and the Moreno case back to the Appellate Division, to consider whether class certification is proper under New York law and the DOL's 13-hour rule for purposes of the plaintiffs' remaining claims concerning labor law violations.

Importantly, the Court reiterated that under the DOL's interpretation, any violation by an employer of the 13-hour rule (e.g., allowing only four hours 59 minutes of uninterrupted sleep) negates applicability of the 13-hour rule and mandates payment for the entire 24 hour shift. While the decision is a significant development for the state's home health industry, litigation based on compliance with the 13-hour rule will likely continue. Accordingly, home health employers may wish to evaluate their pay practices to ensure compliance.

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