

## On Re-argument, Judge Affirms Janitors Ineligible for Overtime Under New York Law

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In a rare decision interpreting the **New York State Department of Labor's** Wage Order applicable to the Building Services Industry, New York State Supreme Court Justice Barbara Jaffe recently revisited and confirmed her prior ruling that employees in a residential building who meet the Wage Order's definition of "janitor" are not entitled to overtime pay under state law. *Mancero v 242 E. 38th St. Tenants Corp.*, 2014 N.Y. Misc. LEXIS 394 (N.Y. Misc. 2014) *prior decision at* 40 Misc. 3d 1213(A) (N.Y. Sup. Ct. 2013).

In *Mancero*, Plaintiffs cited to authority regarding the applicability of separate Wage Orders (other than Building Services) to employees who are exempt from overtime under the FLSA, arguing that the Building Wage Order "does not prohibit janitors from earning overtime pay, but only prohibits them from being paid overtime at one and one-half times the regular rate, thereby permitting overtime at some other rate." They did not dispute that they were "janitors" under the Wage Order who "render[ed] . . . physical service in connection with the maintenance, care or operation of a residential building." 12 NYCRR § 141-3.4. On renewed review of their claim and the authority cited by Plaintiffs, Justice Jaffe adhered to her prior ruling, noting that Plaintiffs' interpretation of the Wage Order "rests on the unreasonable assumption that the DOL provided that residential janitors are not entitled to overtime at the specified rate without providing the rate to which they are entitled."

Industry employers must determine who can qualify as the "janitor" within the meaning of the Wage Order and consult with counsel regarding compliant compensation practices.

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