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New York State Supreme Court Finds 24-Hour Home Care Attendants Must be Paid for Sleep and Meal Periods

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The New York State Department of Labor ("NY DOL") has consistently enforced the New York Labor Law ("NYLL") as permitting third-party employers of 24-hour home care attendants to pay their employees for 13 hours of a 24-hour shift, provided the employee is afforded eight hours of sleep, five of which are uninterrupted, and three uninterrupted hours for meals.[1] A recent decision by the New York State Supreme Court (the highest trial-level court for civil cases in the New York state court system) has rejected the NY DOL's interpretation of the NYLL and refused to find binding a New York federal court decision that relied on a 2010 NY DOL Opinion Letter addressing wage practices for home care attendants.[2] Instead, in *Andryeyeva v. New York Home Attendant Agency,* the New York state court found that sleep and meal periods must not be excluded from the hourly wages of a home attendant who does not "reside" in the home of his or her client, and certified a class action of over 1,000 home care attendants who worked 24-hour shifts.[3] There are additional cases raising these same issues pending in the New York state court, including at least one other filed by the same plaintiff's firm.[4] Therefore, home care agencies operating in New York are at risk of copy-cat litigation and should be diligent with their pay practices.

Relevant Provisions of the New York Labor Law

In New York, "[s]leep-in home attendants employed by ... vendor agencies" are not exempt from the NYLL's coverage.[5] The NYLL's regulations 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."[6] "Residential employee" is defined by the applicable regulations as "*one who lives on the premises of the employer.*"[7]

1 This article does not address wage and hour practices where the employees are covered by a collective bargaining agreement or employed directly by the patient.

2 *Severin v. Project Ohr, Inc.*, 2012 U.S. Dist. LEXIS 85705 (S.D.N.Y. June 20, 2012).

3 45 Misc. 3d 820 (Sup. Ct. Kings County Sept. 16, 2014) (Demarest, J.) (hereinafter "*Andryeyeva*"). The *Andryeyeva* decision is currently pending appeal.

4 *Kodirov v. Community Home Care Referral Service, Inc.* No. 6870/11 (N.Y. Sup. Ct. Kings County) (purported class action brought by same law firm as the *Andryeyeva* case pending before the same judge); *Moreno v. Future Care Health Servs., Inc.*, No. 500569/13 (N.Y. Sup. Ct. Kings County); *Melamed v. Americare Certified Special Services, Inc.*, No. 503171/12 (N.Y. Sup. Ct. Kings County).

5 *Severin*, 2010 U.S. Dist. LEXIS 85707 (citing *Settlement Home Care, Inc. v. Indus. Bd. of Appeals of the Dep't of Labor*, 151 A.D.2d 580 (2d Dep't 1989)).

6 12 N.Y.C.R.R. § 142-3.2.

7 12 N.Y.C.R.R. § 142-2.1.

The minimum wage order (the "Wage Order") applicable to home attendants 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.[8]

The March 11, 2010 Opinion Letter

On March 11, 2010, the NY DOL issued an Opinion Letter, RO-090169,[9] relating to live-in companions, that addressed a vendor agency's inquiries regarding wage practices for home care attendants. In the Opinion Letter, the NY DOL's general counsel's office interpreted its own minimum wage order and confirmed that home care attendants working 24-hour shifts who are employed by vendor agencies are considered "non-residential" and must be paid overtime after 40 hours of work per week.

The NY DOL explained that although New York Labor Law Regulation 12 N.Y.C.R.R. § 142-2.1 provides that the minimum wage shall be paid to employees for the time an employee is permitted to work or is required to be available at a place prescribed by the employer, "'residential employees,' those who live on the premises of their employer, are not deemed to be working during normal sleeping hours merely because the employee is 'on call' for those hours or at any time the employee is free to leave the place of employment."[10] However, the NY DOL found that the distinction regarding whether or not the attendant is "residential" is only "important for the purposes of determining the number of hours at which overtime is owed (44 for residential employees vs. 40 for non-residential employees)," however, *"the Department applies the same test for determining the number of hours worked by all live-in employees."*[11] The Opinion Letter continued:

> In interpreting these provisions, it is the opinion and policy of this Department that 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 an aide does not receive five hours of uninterrupted sleep, the eight-hour sleep period exclusion is not applicable and the employee must be paid for all eight hours. Similarly, if the aide is not actually afforded three work-free hours for meals, the three-hour meal period exclusion is not applicable.[12]

Thus, the NY DOL, in interpreting its own Wage Order, specified that home care attendants who work 24-hour shifts must only be paid for 13 hours, provided the home care attendant was afforded eight hours of sleep, five of which were uninterrupted, and afforded three uninterrupted hours for meals.

Andryeyeva v. New York Health Care, Inc.

In *Andryeyeva*, the plaintiffs, 24-hour home care attendants, filed a putative class action in New York State Supreme Court challenging the 13-hour pay practice.[13] The defendant, a New York for-profit home care agency, employed the plaintiffs to work as home attendants for disabled or infirm individuals.[14] The issue in dispute with respect to whether class certification was appropriate was whether the Wage Order requires

8 12 NYCRR § 142-2.2.

9 An attorney representing an employer of "Live-In Companions" sent in a "Request for Opinion" to the NY DOL and, in response, the general counsel's office issued an opinion letter. This was an accepted method of obtaining advice regarding compliance with the NYLL. However, opinion letters are strictly advice and not law and can become obsolete based on changes in law, rules or regulations.

10 *Id.* pp. 3-4.

11 *Id.* p. 4 (emphasis applied).

12 *Id.*

13 *Andryeyeva*, 45 Misc. 3d 820, 822 (Sup. Ct. Kings County Sept. 16, 2014). The *Andryeyeva* court made its findings regarding pay practices for 24-hour home attendants in the context of its decision on the plaintiffs' motion for class certification. That decision is currently being appealed.

14 *Id.* at 822.

the defendant to pay 24-hour home attendants for each of the 24 hours of a 24-hour shift, regardless of how many hours an individual home attendant was actually able to take for meals and sleep, or whether eight hours for sleep and three hours for meals may be excluded.[15] The "subsidiary issue" was how many hours of the 24-hour shift must be counted towards overtime pay.[16]

The March 11, 2010 Opinion Letter is Found Inapplicable

The defendant relied on the March 11, 2010 Opinion Letter interpreting the Wage Order in support of its argument that it has the right to deduct sleep and meal time from the putative class members' compensation. The court, however, found the Opinion Letter inapplicable.[17] The court focused on two main issues.

First, the court found that because the plaintiffs did not "reside" in the home of the patient, the 13-hour day pay method was inapplicable to them. In this regard, the court focused on the plain language of the Wage Order, which provides that 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 during his sleeping hours or at any time he/she is free to leave."[18] The court found that the plaintiffs did not "reside" in the home of their employer because the plaintiffs maintained residences elsewhere. However, as the defendant argued, the March 11, 2010 Opinion Letter specifically states that the issue of whether the home attendant is a residential employee is relevant *only* to determine the number of hours at which overtime is owed (44 for residential and 40 for nonresidential). In fact, the Opinion Letter states that the NY DOL applies the same test for determining the number of hours worked by all live-in employees—whether residential or nonresidential.[19]

The Opinion Letter also states "[i]n interpreting these provisions, it is the opinion and policy of this Department that *live-in* [not residential] 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."[20] The *Andryeyeva* court however, found the March 11, 2010 Opinion Letter inapplicable on the grounds that the employees addressed in the Opinion Letter were residential employees, while the plaintiffs in the case before it were not residential. In the NY DOL's view, however, this distinction should not have been the determining factor; the Opinion Letter specifically says that the same test applies regardless of whether the attendant is "residential."

Second, the *Andryeyeva* court found the Opinion Letter applied only to employees who are exempt from overtime under the federal Fair Labor Standards Act (FLSA). However, the Opinion Letter specifically states that whether the employees are exempt under the FLSA only bears on what rate the employee will be paid overtime, *i.e.*, one-and-a-half times the New York minimum wage if exempt under the FLSA or one-and-a-half times the employee's regular rate if not exempt under the FLSA.[21] Thus, contrary to the court's holding, the Opinion Letter does not state that employers can only deduct sleep and meal periods from the hourly wages of employees exempt under the FLSA.[22]

The *Andryeyeva* Court Finds the *Severin* Decision Inapplicable

The *Andryeyeva* court refused to be bound by the decision of the New York federal court in *Severin v. Project OHR, Inc.*,[23] even though essentially the same facts had been presented to both courts and both cases were decided in the same procedural posture, *i.e.*, in consideration of a motion to certify a class action. The *Severin* court relied on the March 11, 2010 Opinion Letter in denying the plaintiffs' motion for class

15 *Id.* at 826.

16 *Id.*

17 *Id.* at 827-828.

18 *Id.* at 826-827.

19 March 11, 2010 Opinion Letter, p. 4.

20 *Id.*

21 *Id.* p. 2 and fn. 1.

22 Other judges in the New York Supreme Court also found the Opinion Letter unpersuasive or nondispositive of the issues in purported class actions raising similar claims. *See, e.g., Moreno v. Future Care Health Servs., Inc.*, No. 500569/13, 43 Misc. 3d 101(A) (N.Y. Sup. Ct. Kings County Jan. 16, 2014) (denying defendants' motion to dismiss and rejecting defendants' reliance on the March 11, 2010 Opinion Letter as "documentary evidence"); *Melamed v. Americare Certified Special Services, Inc.*, No. 503171/12 2014 N.Y. Misc. LEXIS 5512 (N.Y. Sup. Ct. Kings County Dec. 11, 2014) (denying defendants' motion to dismiss and finding the Opinion Letter does not definitively dispose of plaintiffs' unpaid wage claims); *Kodirov v. Community Home Care Referral Service, Inc.* No. 6870/11, 35 Misc. 3d 1221(A) (N.Y. Sup. Ct. Kings County May 8, 2012) (in purported class action brought by same law firm as the *Andryeyeva* case pending before the same judge, court discounted the relevance of the Opinion Letter).

23 Civil Action No. 10 Civ. 9696, 2012 U.S. Dist. LEXIS 85705 (June 20, 2012).

certification, finding that the NYLL does not require home care agencies to pay all 24-hours of a sleep-in shift, provided they are afforded eight hours for sleep, five of which is uninterrupted, and are afforded three hours for meals.[24] The *Severin* court determined that the NY DOL's Opinion Letter, which interprets its own Wage Order, must be given deference because it explains what it means to be "available for work at a place prescribed by the employer" in the context of home health aides working 24-hour shifts in the home of a client, and the interpretation does not conflict with the plain meaning of the regulatory language, nor is it unreasonable or irrational.[25]

In distinguishing *Severin*, the *Andryeyeva* court found that the federal court "improperly conflated" the rules applicable to home attendants who provide 24-hour services inclusive of overnight care with the rules applicable to home attendants who are "live-in" residents of their employer's homes.[26] However, there is no support for this finding in the *Severin* decision.

Implications of the *Andryeyeva* Decision and Recommendations

The defendants have appealed the *Andryeyeva* decision, and it may take over a year to receive a decision on appeal. In the meantime, the law is unsettled with regard to whether third-party employers of home attendants may exclude sleep and meal periods from the home attendants' compensation.

On February 12, 2015, the NY DOL advised the industry at a conference that it will enforce the 13-hour workday pay practice unless the employee has specific records showing that he/she was not afforded eight hours for sleep, five uninterrupted hours, and three uninterrupted hours for meals.

Therefore, it is recommended that if a home health care agency decides to assume the risk of continuing to pay home care attendants working 24-hour shifts on the 13-hour workday pay method, it should keep accurate records of the employee's uninterrupted sleep and meal time and require such attendants to certify the accuracy of the time they submit. Furthermore, to strengthen their position in the event of a lawsuit, employers should enter into agreements with their employees, setting forth the compensation terms and ensuring that the requirements for a reasonable agreement and the criteria necessary to exclude sleep time under the federal regulations are met. Because of the risk associated with the practice of excluding sleep time in light of *Andryeyeva*, New York home care employers should strongly consider implementing an arbitration program with a class action waiver in order to avoid the cost and expense of a class action lawsuit.

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24 *Id.* at *22.

25 *Id.* at *25.

26 *Id.* at **16-17.