# New York Court: Minimum Wage Due for All On-Premises Hours Required of Non-Resident Home Care Attendants

By Noel P. Tripp

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In a significant blow to the home health care industry in New York, non-resident home health care attendants must be paid minimum wage for all hours they are required to remain at the client's home, including hours when they may be sleeping, eating, or performing other personal tasks, the Brooklyn-based Appellate Division, Second Department, has held. *Andryeyeva v. New York Health Care, Inc.,* 2017 N.Y. App. Div. LEXIS 6408 (N.Y. App. Div. 2nd Dep't Sept. 13, 2017); *Moreno v. Future Care Health Services, Inc.,* 2017 N.Y. App. Div. LEXIS 6462 (N.Y. App. Div. 2nd Dep't Sept. 13, 2017). The court joins its sister court, the Manhattan-based First Department, in this holding. The Second Department is one of the state's four mid-level courts of appeal.

## New York Labor Law

With respect to in-home health care aides, New York's Labor Law regulations 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." Under the applicable regulations, a "residential employee" is defined as "one who lives on the premises of the employer."

A Wage Order issued by the New York Department of Labor (NYDOL) 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.

In 2010, the NYDOL general counsel issued an Opinion Letter interpreting this Wage Order and in the relevant portion, stated that the Department's policy is 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 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 reiterated the Department's view as set forth in numerous prior letters, including a 1998 letter issued directly by the then-Commissioner of Labor.

## Background

In *Andryeyeva* and *Moreno* (both filed as putative class actions), the plaintiffs were employed as home health care attendants for their respective employers' elderly and disabled clients. The plaintiffs regularly worked so-called 24-hour shifts at the clients' homes. In *Andryeyeva,* the plaintiffs were paid the minimum hourly wage for the first 12, daytime hours of a shift, but were paid a flat rate for the remaining 12, nighttime hours. Similarly, in *Moreno,* the plaintiffs were paid a flat rate for each 24-hour shift. In both cases, the plaintiffs claim that they were "non-residential" employees because they maintained separate residences outside of the clients' homes. Therefore, the plaintiffs allege in their lawsuits, the sleep and meal break exceptions set forth in the 2010 NYDOL Opinion Letter were inapplicable to them and they were entitled to be paid minimum wage for the entire 24-hour shift, regardless of being afforded rest, meal, or other breaks. The employers argued that the plaintiffs were

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properly paid, relying on the 2010 Opinion Letter. In *Andryeyeva,* the lower court granted the plaintiffs' motion for class certification and the employer appealed. Conversely, in *Moreno* the lower court denied a motion for class certification (deferring to the NYSDOL view) and the plaintiffs appealed.

## Court View: NYDOL Letter Fails to Properly Distinguish Between "Residential" and "Non-Residential" Employees

In opinions concurrently issued, the Second Department affirmed the grant of class certification in *Andryeyeva* and reversed the denial of certification in *Moreno.* In both cases, the Appellate Division concluded that where a home health aide maintains a residence outside of the client's home, he or she properly is categorized as a "non-residential" employee, to whom the sleep and meal break exclusions are inapplicable. "In short," held the court in *Andryeyeva,* "to the extent that the members of the proposed class were not 'residential' employees who 'live[d] on the premises of the employer,' they 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." Therefore, the court added, "[t]o the extent that the [NY]DOL's opinion letter fails to distinguish between 'residential' and 'nonresidential' employees," it is "neither rational nor reasonable" and "conflicts with the plain meaning of the [Wage Order], and should not be followed."

The Second Department's decisions recognize and align with a prior 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), although some federal district courts have rejected this view. *Bonn-Wittingham v. Project O.H.R. (Office for Homecare Referral), Inc.,* 2017 U.S. Dist. LEXIS 75286 (E.D.N.Y. May 17, 2017) (rejecting *Tokhtaman* because "DOL Letter's reasoning is not irrational or unreasonable").

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Absent a contrary ruling by the New York Court of Appeals or action by the NYDOL and/or Department of Health, New York's home health industry could find itself in serious financial crisis, notes Jackson Lewis Principal Frank Fanshawe. Mr. Fanshawe's practice focuses on health care law and he previously served as a senior adviser to the New York State Senate Health Committee chair on legislative and public policy issues.

We will continue to follow these developments. Please contact the Jackson Lewis attorney with whom you work about the decisions or other wage and hour compliance issues.