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Court of Appeals Upholds DOL's Interpretation of NY's Minimum Wage Order as Applied to Live-In Home Health Aides

On March 26, 2019, in a 5-2 ruling, the Court of Appeals ruled in favor of providers in a critical decision affecting home health care. *Andryeyeva v. N.Y. Health Care, Inc.* and *Moreno v. Future Care Health Servs. et al.* was a joint appeal in a case that threatened to eviscerate an important economic constraint on the cost of providing live-in 24-hour home care, and which placed at risk the fiscal integrity of New York's Medicaid program and the very existence of New York's home care industry.

Home health aides challenged the New York State Department of Labor's (DOL) 13-hour rule, which provides that live-in employees must be paid for at least 13 hours per 24-hour period, provided they are afforded at least eight hours of sleep, five hours of which must be uninterrupted, and three hours for meal times. If the aides are given the required sleep and meal times, totaling 11 hours, they are not paid for these breaks. In this case, home health aides argued that they were entitled to minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleeping and eating. Providers long had relied on DOL's interpretation when compensating their employees, and were suddenly in jeopardy of being held liable for retrospective pay exceeding an estimated $4.8 billion.

The Appellate Division had sided with the home health aides, but the Court of Appeals reversed, finding that the lower court "failed to afford adequate deference to DOL's interpretation of the [Minimum] Wage Order." The Court underscored that it is a basic tenet of administrative law to give judicial deference to an agency's interpretation of its own regulations.

Pursuant to New York's Minimum Wage Order, an employee must be paid the minimum wage for the time when they are "required to be available for work at a place prescribed by the employer." The Court rejected plaintiffs' interpretation that "once a worker is physically present at the designated work site, they are thus able to work if called upon and so are 'available for work.'" In doing so, the Court applied fundamental rules of statutory construction and determined that DOL's interpretation – that "available for work" in the context of a 24-hour shift excludes scheduled sleep and meal times – was not irrational or unreasonable because "[t]hat language requires both a presence and an availability during a time scheduled for actual work." Notably, the Court pointed out that DOL's interpretation has not wavered, and has remained consistent "for nearly five decades, during eight gubernatorial administrations and the tenure of 13 Commissioners of Labor, representing the same fair and studied judgment of officials throughout that time."

The Court also found that DOL's interpretation reflects its expertise and its experience that "a patient may need an aide on site around-the-clock without requiring adult care services for all 24 hours of the day. . . . Indeed, when a patient requires full-time attention and care, two home health aides are, or ought to be, assigned to separate twelve-hour shifts." Finally, the Court was persuaded by the fact that DOL's interpretation conforms to federal guidance on the calculation of compensable hours. Ultimately, the Court concluded, "it is for DOL and the Legislature, not [the] Court, to consider whether the sleep and meal time exemption is a viable methodology to ensure employer compliance with the law and proper wage payment."

Associate Judge Michael Garcia, joined by Associate Judge Eugene Fahey, dissented, finding that DOL's interpretation was at odds with the plain text of the Minimum Wage Order. The Wage Order's single exception for residential employees, which did not apply to the plaintiffs in this case because they do not live on their employers' premises, provides that sleeping hours are expressly excluded from the time residential employees are considered "available for work." Thus, the dissent argued, "the exception signifies that, for all other employees, sleep hours *do* constitute time they are 'available for work' – and, accordingly, must be paid." The dissent opined that if DOL "prefer[ed] an alternative compensation scheme – so as to dock eleven hours of plaintiffs' pay – it should amend the Wage Order in accordance with statutory procedure."

While the Court upheld the 13-hour rule, it remitted to the Appellate Division the question of class certification premised on allegations of systemic violations of the Minimum Wage Order and Labor Law, such as failure to compensate aides who did *not* receive the minimum sleep and meal times. Thus, the Court did not foreclose the possibility that providers may face class action liability for not providing the required sleep and meal times. DOL, as *amicus curiae*, represented to the Court that "failure to provide a home health care aide with the minimum sleep and meal times required under DOL's interpretation of the Wage Order is a 'hair trigger' that immediately makes the employer liable for paying every hour of the 24-hour shift, not just the actual hours worked." Effectively, the Court has drawn a line between providers that comply with DOL's interpretation and those that do not. Accordingly, providers who supply home health aides would be wise to review their policies and practices to ensure strict compliance with the sleep and meal time requirements.

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