

EMPLOYMENT

The Court of Appeals Salvages the Home Health Care Industry by Upholding the DOL's "13-Hour Rule"

By Mordy Yankovich

Employers in the home health care industry can breathe a sigh of relief as New York State's Highest Court ruled that home health care aids do not have to be paid for their entire 24-hour shift, so long as certain conditions are met. In *Andryeyeva v. New York Health Care Inc.* and *Moreno v. Future Care Health Services, Inc.*, 2019 Slip Op 02258 (Mar. 26, 2019), The New York Court of Appeals gave deference to the Department of Labor's "13-Hour Rule" which permits an employer to pay its home health care aide employees for 13 hours of a 24 hour shift on the condition that the employee is permitted a sleep break of at least eight hours – and actually receives five hours of uninterrupted sleep – and three hours of meal break time.

By way of background, the Miscellaneous Industries and Occupations Minimum Wage Order ("Wage Order"), which applies to home health care workers, states, in relevant part, as follows: "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. NYCRR 142-2.1 (b).

The issue as it relates to the home health care industry is whether employees who work a 24-hour shift are "required to be available for work" for

the entire shift and are, thus, entitled to compensation for all 24 hours. The Department of Labor ("DOL") issued an Opinion Letter in March 2010 clarifying the Wage Order as it applies to live-in employees including home health care aides. The Opinion Letter states that live-in employees must be paid not less than 13 hours per 24-hour shift. The remaining 11 hours are not compensable as they are allocated for eight hours of sleep and three hours of meal time. However, if the employee does not receive at least five hours of uninterrupted sleep and work-free meal breaks, the employer must compensate the employee for the entire 24-hour shift.

Andryeyeva and *Moreno* are home health care employees who originally brought suit in New York State Supreme Court, Kings County, arguing that the DOL Opinion letter should not be given deference. Rather, the plaintiffs argued that the employees were required to be available to work for the entirety of their shift and, thus, according to the plan meaning of the Wage Order, must be compensated for the entire 24-hour shift. The *Andryeyeva* Court refused to apply the "13-hour rule" while the *Moreno* Court gave deference to the DOL's position.

The Appellate Division, Second De-



MORDY YANKOVICH

partment heard both cases together and held that the DOL's interpretation of the Wage Order is neither "rational nor reasonable" because the plain language of the Wage Order requires employers to pay live-in employees for hours they are "required to be available for work" regardless of whether they are afforded sleep or meal breaks. The Appellate Division reasoned that hours in which the health care aides were required to be available for work included night time hours even where the employee was "not called upon to perform services."

The Court of Appeals reversed the Appellate Court's Decision ruling that the DOL's interpretation of the "Wage Order" was entitled to deference. The Court of Appeals reasoned that the DOL's interpretation of the Wage Order was rationally based on the reality that a home health aide isn't hired to be attentive for 24-hours. Rather, if 24-hour attentive care is required, two health aides would be hired to work consecutive 12-hour shifts.

However, the Court of Appeals did not turn a blind eye to the potential for employer exploitation of the "13-hour rule." The Court of Appeals, thus, specified that if the employee does not receive the minimum break time, the employee must be paid for the entire 24 hours. The

Court of Appeals further noted 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. Even if the aide sleeps without interruption for four hours and 59 minutes, the aide must be compensated for the entire eight hours allotted for sleep. The Court of Appeals remanded the cases to the lower court to determine whether these particular health aides were afforded with the requisite hours of breaks for sleep and meals.

Following this decision, it is imperative to advise all employers in the home health care industry to contact an employment attorney to audit their payroll practices and revise their policies to ensure health aides are instructed to accurately track their time and promptly notify their employers in the event they are required to work during their allotted breaks. Failing to do so can expose employers to substantial liability for unpaid wages, overtime compensation, liquidated damages and attorneys' fees.

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CHANGES IN THE SECOND DEPARTMENT

Presiding Justice Alan D. Scheinkman wishes to advise our members of the following important changes to practice in the Second Department.

First, if an appeal is resolved, either before or after argument, counsel should make sure to notify the court. The justices have been spending time preparing cases that have been settled and which could otherwise be used for cases that are ongoing. Even if the case settles after argument, counsel should notify the

court. He indicated that the justices are considering sanctioning lawyers who fail to do so.

Second, an issue exists regarding counsel of record for the appeal. Counsel should notify the Appellate Division of the identity of counsel of record, and the court has instituted procedures for changing counsel of record.

For more information, please visit the Second Department website.

CYBER

E-discovery and Redaction in 2019

By Victor Yannacone, Jr.

According to EDRM, a somewhat informal industry standard group, maintained by the Duke Law Center for Judicial Studies, to develop and publish frameworks, standards, and resources that address practical issues relating to e-discovery and information governance, the goal of document production in the world of electronically stored information is to prepare and produce ESI in an efficient and usable format in order to reduce cost, risk and errors and comply with agreed production specifications and timelines. <https://www.edrm.net/frameworks-and-standards/edrm-model/production/>

Many attorneys fail to properly manage discovery and document production in this age of e-discovery. The most common failures by attorneys in document production are ignorance of

(Continued on page 34)

