ANOTHER FEDERAL COURT DEFERS TO THE N. Y. DOL OPINION LETTER ON COMPENSATION OF LIVE-IN AIDES

Home Care Alert
December 19, 2017

In a decision that will be helpful to home care agencies, a federal judge has ruled that live-in aides do not have to be paid for all 24 hours of a live-in shift. *See Rodriguez DeCarrasco v. Life Care Services, Inc.*, 2017 WL 6403521 (S.D.N.Y. 2017).

As most agencies know, earlier this year the First and Second Departments, Appellate Division, had held that live-in aides must be paid for all 24 hours of a 24-hour shift, irrespective of how many hours the aides receive for sleep or meal periods. *See Tokhtaman v. Human Care, LLC*, 149 A.D.3d 476, 477 (N.Y. App. Div. 2017); *Andryeyeva v. New York Health Care, Inc.*, 153 A.D.3d 1216, 1218–19 (N.Y. App. Div. 2017) (finding that the NYDOL interpretation to be "neither rational nor reasonable, because it conflicts with the plain language of the Wage Order" and finding that if the members of the putative class were non-residential employees, 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"); *Moreno v. Future Care Health Servs.*, Inc., 153 A.D.3d 1254, 1255–56 (N.Y. App. Div. 2017) (holding the same). But on December 15, 2017, in *Life Care Services Inc.*, a federal court for the Southern District of New York affirmatively rejected the rationale of these appellate decisions, holding:

*"Several New York state appellate courts concluded that the Opinion Letter conflicted with the New York Regulation and, hence, should not be followed…In contrast, the federal district courts in this district have found that the Opinion Letter is entitled to deference. In Severin v. Project Ohr, Inc., 2012 WL 2357410, at *8 (S.D.N.Y. 2012), the court held that the letter did not conflict with the New York Regulation. According to the Severin Court, the New York Regulation itself stated, without explanation, that employees should be paid for time that they 'are required to be available for work at a place prescribed by the employer.' .. The Opinion Letter then interpreted the meaning of being '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;' more specifically, HHAS are only available 'for thirteen hours of the day, provided the aide is afforded at least eight hours for sleep and actually receives five hours of continuous sleep.' The Court thus found that the NYDOL interpretation was neither unreasonable nor irrational…In Bonn-Wittingham v. Project O. H.R., 2017 WL 2178426, at *2–3 (E.D.N.Y. 2017), the court similarly found that the*

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Opinion Letter was deserving of deference…While this Motion was pending, on October 25, 2017 the NYDOL amended 12 N.Y.C. R.R. § 142-2.1(b) to add the following provision: Notwithstanding the above, this subdivision shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the Fair Labor Standards Act of 1938, as amended, in accordance with sections 785.19 and 785.22 of 29 C.F.R. for a home care aide who works a shift of 24 hours or more…The amendment was promulgated, because: 'The emergency regulation is necessary to preserve the status quo, prevent the collapse of the home care industry, and avoid institutionalizing patients who could be cared for at home, in at the face of recent decisions by the State Appellate Divisions … that treat meal periods and sleep time by home care aides as hours worked for purposes of state (but not federal) minimum wage… [T]he Commissioner must take action now to avert an impending crisis. Emergency adoption of this regulation is necessary for the preservation of the public health, safety, and general welfare to ensure that home care aides will be available to provide care for, and avoid the institutionalization of, those who rely on home care. The purpose and intent of this rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation that compensable hours worked under the State Minimum Wage Law do not include meal periods and sleep time of home care aides who work shifts of 24 hours or more…The Court here joins the other federal district courts that have considered the issue and rejects the Tokhtaman line of cases from the New York Appellate Division. The Court finds, as did the Severin Court, that the Opinion letter is not in conflict with the regulation; rather it expands upon the Regulation, by defining what it means to be 'available for work.' The Court also concurs with the Severin Court that the Opinion Letter is neither 'unreasonable' nor 'irrational' …The Court's interpretation is bolstered by the October 2017 Amendment to the Regulation and accompanying statement of intent—to 'codify the Commissioner's longstanding and consistent interpretation that compensable hours worked under the State Minimum Wage Law do not include meal periods and sleep time of home care aides who work shifts of 24 hours or more."

The Court, thus, refused to certify a class of aides who claimed they should have been paid for all hours of a 24-hour shift.

If you have questions about this legal development and how it impacts ongoing litigation with your live-in aides or how your agency can comply with these wage and hour requirements, please contact any one of our Home Health Care Practice Group attorneys.