New York State Department of Labor Responds to Recent Appellate Division Decisions Regarding Wages For 24-Hour Home Care Workers

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The New York State Department of Labor (NYDOL) recently modified the Minimum Wage Order for Miscellaneous Industries and Occupations – effective October 6, 2017 – to eliminate any doubt about its long-standing guidance that home care workers who work 24-hour shifts are not required to be paid the minimum wage for meal periods and sleep time under New York Labor Law ("NYLL"). The provision expressly states that workers are not entitled to compensation for meal and sleep breaks under the Fair Labor Standards Act in accordance with 29 C.F.R 785.19 and 785.22, and are not entitled to compensation for same under the NYLL. While this new Wage Order does not end the debate and there is still uncertainty on where the Courts will ultimately come out on these issues, this action by the NYDOL is welcome news for home health care providers.

The NYDOL's changes specifically refer to 12 N.Y.C.R.R. §142-2.1(b) (all employers except nonprofits) and §142-3.1(b) (nonprofits). Employers are reminded that:

- C.F.R. 785.19 states that bona fide meal periods of 30 minutes or more are not meal time and that it is not necessary that an employee be permitted to leave the premises if the employee is otherwise completely freed from duties during the meal period.
- C.F.R. 785.22 states that where an employee is required to be on duty for 24 hours or more, the employer and employee may agree to exclude bona fide meal periods and bona fide regularly scheduled sleeping periods of not more than 8 hours from hours worked, provided the employee can get at least 5 hours' uninterrupted sleep.

The Appellate Division, First Department's ruling in *Tokhtaman v Human Care, LLC,* which was decided on April 11, 2017 and the Appellate Division, Second Department's rulings in *Andryeyeva v. New York Home Attendant Agency* and *Moreno v. Future Care Health Servs., Inc.,* both decided on September 13, 2017, held that the Department of Labor's interpretation of the previous version of its Wage Order, as memorialized in the DOL's March 2010 Opinion Letter, was not rational as it applied to home care workers who worked 24-hour shifts on the premises of their clients. However, the DOL's amendments make clear that its position

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going forward is to apply these exemptions to home care workers, regardless of whether they maintain their own residence, thereby permitting their employers to pay them for 13 hours of work, assuming they are granted duty-free meal periods and adequate uninterrupted sleep.

While this amendment provides guidance going forward for the home care industry and clearly indicates the DOL's position on whether home care workers should be paid for meal periods and time spent sleeping, there are significant challenges ahead considering the Appellate Division's rulings and the numerous individual cases and putative class actions winding their way through the court system. Peckar & Abramson's Labor Law and Employment Practices Group is on the forefront of litigating these issues on behalf of numerous clients and is hopeful that the New York Court of Appeals will issue a ruling in the coming months that will be beneficial to the industry and will clarify the law. If you have any questions about the effect of the Wage Order on your business, or other wage and hour issues affecting the home care industry, please contact us.