



AARON C. SCHLESINGER



ALEXANDER X. SAUNDERS

## NEW YORK COURT DENIES CLASS ACTION STATUS FOR OVERNIGHT HEALTHCARE WORKERS AND UPHOLDS EMPLOYERS' PAYMENT OF THIRTEEN HOURS FOR A TWENTY FOUR HOUR SHIFT

On May 4, 2015, the Hon. David I. Schmidt, Justice of the Supreme Court of the State of New York, Kings County, issued a decision in *Adriana Moreno, et al. v. Future Care Health Services, Inc., et al.*, Index No. 500569/13, denying class certification sought by healthcare workers for a claim against a prior employer, Future Health Care Services, Inc. ("Future Care"). The healthcare workers complained that their pay did not include all hours worked, overtime, spread of hours pay, in-service training, and expenses for uniforms and other work related items. In the decision, Judge Schmidt determined that plaintiffs had not met the requirements of the statute (CPLR 902) for certifying their action as a class action (to apply to all similar workers, even those not named in the suit). It is important to note, however, that the court held that, under the New York Labor Law and a New York Department of Labor ("DOL") opinion letter dated March 11, 2010, live-in employees such as Home Health Aides ("HHA") must be paid not less than thirteen hours per 24-hour shift period as long as they are afforded at least eight hours of sleep—five hours of which are uninterrupted—and three hours for meal breaks.

In rendering the decision, Justice Schmidt disagreed with fellow Kings County Supreme Court Justice Carolyn Demarest's September 16, 2014 decision in *Andryeyeva v. New York Health Care, Inc.*, 45 Misc 3d 820 (Sup Ct, Kings County, September 16, 2014), which held that live-in HHAs are entitled to be paid for every hour of a 24 hour shift because they are essentially on call for the entire 24 hours and thus entitled to be paid for each hour they are present on the premises, regardless of break time spent on meals or sleeping. Justice Schmidt determined that the *Andryeyeva* court erred because it did not "pay sufficient deference" to the DOL's opinion letter.

Under New York law, the HHAs seeking to proceed as a class action had to demonstrate (1) that the class is so numerous that joinder of all members is impractical, which is commonly referred to as "numerosity"; (2) that questions of law or fact common to the class predominate over questions of law or fact affecting individual class members, which is commonly referred to as "commonality"; (3) that the claims or defenses of the class representatives are typical of those in the class, which is commonly referred to as "typicality"; (4) that the class representatives will fairly and adequately protect the interests of the class; and (5) that a class action represents the superior method of adjudicating the controversy, which is commonly

### Please Contact

Aaron C. Schlesinger, Esq.  
aschlesinger@pecklaw.com  
201.343.3434

Alexander X. Saunders  
asaunders@pecklaw.com  
201.343.3434

referred to as “superiority.” Plaintiffs are also required to demonstrate additional conditions including the interest of individual class members in maintaining separate actions, the existence of pending litigation pertaining to the same controversy, the desirability of the proposed forum, and difficulties in managing the proposed class.

New York Labor Law requires employers to pay the minimum wage rate “for each hour worked,” which for the majority of the relevant time period was \$7.25 per hour. The HHAs asserted that starting in approximately May of 2011, they were required to work 24-hour shifts which were referred to as “live in” shifts at the flat rate of \$115 to \$125, and that those rates did not properly compensate them for a 24-hour work period when taking into account the minimum wage rate.

In response, the employers argued that the flat rate amounts paid were appropriate because New York Labor Law and the DOL opinion letter do not require that HHAs be paid for the entire 24 hours that they are present at patients’ residences as long as they receive the break time for meals and sleep as discussed above. The court in agreeing with the employers, held that the DOL opinion letter was entitled to deference in setting requirements for working hours because the DOL’s interpretation did not “run counter to the clear wording of the statute and regulations at issue.” Applying the relevant statute, regulations, and the DOL opinion letter, the court found that the HHAs failed to demonstrate an across the board violation of the rights of the proposed class members. The court calculated the minimum wage of a worker who worked a 24-hour shift and received the requisite sleep and meal breaks, and determined that such a worker would have been entitled to \$101.50 per 24-hour shift. Plaintiffs had previously conceded that they were paid no less than \$115 so the court determined that it could find a violation of a worker’s rights only if the worker did not have three hours of meal time or eight hours of sleep, including five hours of uninterrupted sleep.

No evidence was submitted to show that the HHAs did not receive such breaks. In this regard, the court found no “evidentiary detail” regarding the work performed by the workers. Significantly, the court found that the HHAs had “made no representation that they, or the other workers performing such shifts, did not have meal or sleep time” and that they had not shown an “across the board policy” demonstrating that the worker’s rights had been violated.

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