

Client Advisory | April 2010

Home Healthcare Aides File Class Action Lawsuit Against Employer for Withholding Overtime Wages

The Department of Labor reports that home health aide work is one of the fastest growing occupations in New York City. But in a survey done by the National Employment Law Project, almost 83% of home health aides surveyed reported overtime payment violations. Employers can face significant liability in class action wage and hour suits alleging failure to comply with state and federal laws.



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On April 13, 2010, Josefina Toledo Montero, on behalf of herself and hundreds of her coworkers filed a class action lawsuit in the Supreme Court of the State of New York against her employer, McMillan's Home Care Agency ("McMillan's"). The lawsuit seeks, among other things, unpaid wages, injunctive relief, and attorney's fees.

McMillan's is a closely held, for profit organization that provides home healthcare to elderly and infirm individuals residing in New York City and Nassau County. It employs and assigns home health aides to provide personal care and assistance to medically needy clients. Ms. Toledo Montero is one of these health aides, and her duties include changing bed linens, helping clients bathe, grocery shopping, house cleaning, and picking up clients' prescriptions from the pharmacy. McMillan's controls the hours, hourly pay, placements, and work schedules of all its health aides.

This class action suit alleges that McMillan's: 1) refused to compensate health aides at the overtime premium for all hours worked during the workweek in excess of forty; 2) refused to compensate aides for attending mandatory "in-service" training sessions; 3) refused to pay aides an additional hour's pay for any day that they worked more than ten hours; 4) refused to

launder or reimburse aides for laundering their required uniforms; 5) required aides to purchase their own supplies, such as latex gloves; 6) failed to keep true and accurate payroll records reflecting the time worked by their aides; and 7) was unjustly enriched by the above described behavior. Each allegation, if true, would violate New York law.

While many wage and hour class action suits are brought under the Fair Labor Standards Act ("FLSA"), plaintiffs' lawyers have been bringing such claims in state court when possible where they seek tactical advantages. The suit against McMillan's was apparently brought under New York state law because the United States Supreme Court has held that home healthcare workers employed by third parties are exempt from the protections of the FLSA. Unlike the FLSA, New York law includes home healthcare workers among those protected by its wage and hour statutes.

Even though the protections of the FLSA do not apply to home healthcare aides, employers can still be in violation of state statutes and state common law. Employers must review their compensation practices and make sure they adhere to both, as well as with federal law. Otherwise, they may face significant liability in class action wage and hour suits.

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