

**NY COURT OF APPEALS POISED TO END THE DEBATE OVER HOW TO  
PAY "SLEEP IN" HOME HEALTH AIDES AND THE RELATED QUESTION  
OF WHETHER THEY CAN MAINTAIN A CLASS**

**By Kevin J. O'Connor\***

There have been multiple decisions at the state level in New York that have caused grave concern to employers in the health care industry, wherein the intermediate level courts have refused to give deference to prior opinions of the New York State Department of Labor ("NYSDOL") concerning the manner and method of paying home health aides ("HHAs") who work 24-hour shifts in the homes of their clients. At long last, today the Second Department in New York granted leave to appeal to the New York Court of Appeals to finally put the rest the validity of these intermediate level decision, and the related issue of whether HHAs are able to gather together and sue as a class, given the individual nature of their claims and working conditions.

Several intermediate level opinions in New York have refused to give deference to NYSDOL opinions on this issue, taking the position that DOL's position conflicted with New York regulations. *See Tokhtaman v. Human Care, LLC*, 149 A.D.3d 476, 477, 149 A.D.3d 476, 52 N.Y.S.3d 89 (1<sup>st</sup> Dep't 2017); *Andryeyeva v. New York Health Care, Inc.*, 153 A.D. 3d 1216, 1218-19, 153 A.D. 3d 1216, 61 N.Y.S.3d 280 (2d Dep't 2017); *Moreno v. Future Care Health Servs., Inc.*, 153 A.D.3d 1254, 1255-56, 61 N.Y.S.3d 589 (2d Dep't 2017).

However, at the same time, the federal courts have simply refused to follow the rationale of these intermediate level decisions, instead holding that the NYSDOL's opinion that HHAs could and should be paid for 13 hours of a given shift provided they

were given adequate sleep and meal time, was entitled to deference. *See Severin v. Project O.H.R., Inc.*, No. 10-cv-9696, 2012 WL 2357410 (S.D.N.Y. June 20, 2012).

The defendants in *Andryeyeva* and *Moreno*, bolstered by amicus briefs filed by, among others, the NYSDOL, sought leave to appeal to the Court of Appeals. Today, the Second Department granted leave, and the issues will hopefully be fully and finally decided in the short term.

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