

NYS COURT INVALIDATES RULE ALLOWING AGENCIES TO PAY 13 HOURS FOR 24-HOUR SHIFTS

Home Care Alert
September 27, 2018

On September 26, 2018, a New York State Supreme Court Judge ruled that the New York Department of Labor (“DOL”) Emergency Regulation WHICH permitted 24 hour live-in workers to receive 13 hours of pay for 24-hour shifts (assuming that the workers actually received 8 hours for sleep and three hours for meal periods on such shifts) was null, void and invalid. As we previously reported, the Emergency Regulation was issued by the DOL on October 6, 2017. The Emergency Regulation affirmed that home care providers may exclude from hours worked bona fide sleep and meal periods. The DOL had promulgated the Emergency Regulation in response to the onslaught of wage and hour class action lawsuits which alleged that live-in workers were entitled to be paid for all 24 hours of a live-in shift. In view of the current reimbursement structure and the class action lawsuits that were being filed against providers, the Emergency Regulation was critical to preserving the providers’ ability to continue servicing live-in cases.

In yesterday’s decision, however, the Judge held that the “record” did not:

“support the finding of an emergency justifying the use of [the State Administration Procedure Act] administrative procedures for emergency rulemaking. Here, although [the New York Department of Labor] claim[s] that the ‘emergency regulation is needed 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 the face of recent decisions by the State Appellate Divisions,’ the record is devoid of any facts upon which to base a finding of ‘immediate necessity, emergency or undue delay.’...A mere need for the monitoring of the home care service industry in light of the Appellate Division rulings and a potential concern about a disruption is not sufficient to justify the use of [the State Administrative Procedure Act] administrative procedures for emergency rulemaking... Furthermore, [the Department of Labor] knew that there may be an issue when litigation was commenced in 2011 challenging their 2010 opinion letter. Yet, [the Department of Labor] chose to wait until after the Appellate Division decisions were rendered to promulgate the ‘emergency’ rulemakings rather than to pursue the normal rule making procedure. This further belies Respondents’ position that an ‘emergency’ arose in October 2017 that necessitated the promulgation of [the

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Emergency Regulation].”

With the court’s ruling, the compensation rules for 24-hour cases in New York is once again in question. Andryeyeva and Moreno, the court cases that necessitated the promulgation of the Emergency Regulation, remain pending at the New York Court of Appeals and a decision is not expected before early 2019.

Please consult any member of our Home Care Group on this matter if you currently serve live-in cases.