HOME CARE CLIENT ALERT

Court Of Appeals Hears Oral Arguments in the 13-Hour Rule Cases

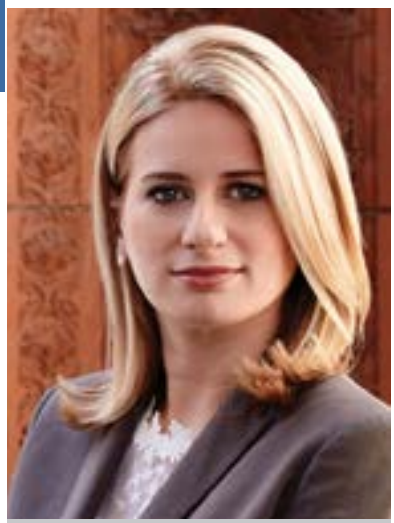
February 13, 2019

All eyes were on the New York Court of Appeals on Tuesday afternoon, as the State's highest court heard the long-awaited arguments in two critical decisions for the home care industry: *Andryeyeva v. New York Health Care, Inc.* and *Moreno v. Future Care Health Servs., Inc.* The Court's decisions in these cases will determine how aides who work 24-hour shifts should be compensated.

The oral arguments in *Andryeyeva* and *Moreno* began at 2:00 p.m. at the Court of Appeals in Albany. Despite a winter weather advisory in Albany on Tuesday, the courthouse was full of industry representatives and home care aides who had come from New York City to hear the cases argued. The home care aides and their legal representatives had gathered on the courthouse steps before the arguments began, holding signs and protesting, urging the Court to abolish the 13-hour rule. The presence of these workers and their representatives did not seem lost on the Court.

During the full hour of oral arguments that were held in *Andryeyeva* and *Moreno*, attorneys representing the home care agencies, and an attorney representing the New York Department of Labor ("Department"), advocated for affirming the 13-hour rule. As we have previously reported, at the heart of these appeals is a longstanding Department regulation, which states that: "minimum wage shall be paid for the time an employee is . . . required to be available for work at a place prescribed by the employer . . . . However, a residential employee--one who lives on the premises of the employer--shall not be deemed to be . . . required to be available for work . . . during his or her normal sleeping hours solely because he or she is required to be on call during such hours; or . . . at any other time when he or she is free to leave the place of employment." *See* 12 NYCRR 142-2.1. While the regulation seemingly applies to only residential home care aides, the Department has for decades opined that the 13-hour rule applies to both residential and non-residential aides. In the cases challenging the regulation and the prevailing industry practice, however, advocates for employees have argued that the regulation and the 13-hour rule should apply to only residential employees.

The seven-judge panel of the Court of Appeals listened intently to the attorneys' arguments, quickly jumping in to ask questions. It was clear that the cases had been well-briefed, and the judges had thought about the issues. Some of the judges seemed troubled that aides working 24-hour cases were required to be at the patients' homes for a full 24-hour period, while only receiving 13 hours of pay. Attorneys representing the agencies noted that bona fide sleep and meal periods were not work time and that, to the extent aides worked during sleep or meal time, they were entitled to be paid. Some of the judges seemed persuaded by these points. Others, however, seemed skeptical that an employee was not deemed to be working when he or she was required to remain on the premises in order to intervene if needed. The justices asked many questions about the meaning of the phrase "available for work" as used in the regulation, and why the Department seemed to have a different definition of the phrase "available for work" for residential and non-residential aides.



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The Court of Appeals judges also seemed troubled by the fact that the Department regulation excluding sleep and meal periods seemed to apply to only "residential" employees. An attorney with the New York Attorney General's office, who represents the Department in these appeals, made arguments in support of the 13-hour rule. He emphasized that, when the regulation was initially promulgated by the Department, third party home care agencies did not exist and aides predominantly lived with the patients that employ them. As the industry evolved, however, and non-residential aides from home care agencies began to work 24-hour cases, the Department expanded the regulation's application to non-residential aides through opinion letters, guidance documents, and enforcement, rather than amending its regulation. Indeed, the Department's interpretation of the regulation was consistently affirmed by it over several decades, through opinion letters and other guidance documents. The attorney for the Department thus argued that there was no need to modify the regulation through formal rulemaking, but he acknowledged that the Department could do so to clarify that the regulation applied to residential and non-residential employees.

In seeming support of the home care industry, two of the judges on the panel pressed the attorneys representing the workers in *Andryeyeva* and *Moreno* as to why the Department's longstanding rules regarding 24-hour cases should be disregarded. They seemed to suggest that the Department's interpretation that bona fide sleep and meal periods on 24-hour cases do not count as hours of work was rational.

Our firm, on behalf of the New York State Association of Health Care Providers ("HCP"), an industry association representing licensed home care agencies across the State, submitted a brief to the Court, urging the Court to affirm the 13-hour rule.

It remains to be seen how the Court of Appeals will ultimately rule on this critical issue. A few of the judges appear to be leaning in favor of the aides and a few seem to be leaning in favor of the industry and the New York State Department of Labor. The remainder will decide the outcome of the case. The Court of Appeals is expected to issue a decision within 30 days. If you have any questions concerning 24-hour cases or the appeals in *Andryeyeva* and *Moreno*, please contact any member of our Home Care Practice.

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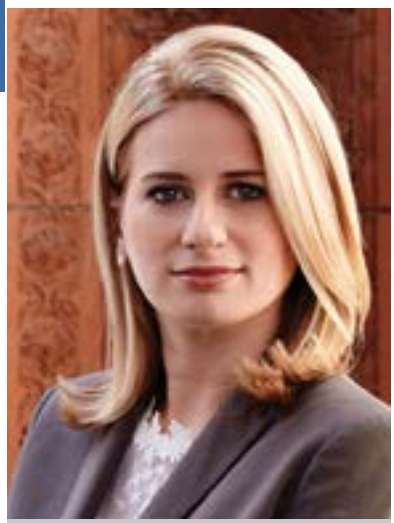

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Our Home Care Practice attorneys provide counsel to multiple home care agencies with respect to corporate, transactional, regulatory, reimbursement, compliance, wage and hour, wage parity enforcement, and litigation matters. With a broad understanding of the New York regulatory landscape, we help clients anticipate and respond to the increasingly complex rules governing the industry.

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