

LAWSUIT SEEKS TO INVALIDATE DOL'S EMERGENCY REGULATION GOVERNING COMPENSATION OF LIVE-IN AIDES

Home Care Alert
May 10, 2018

On Friday, May 4, 2018, a coalition of worker advocacy groups and five home health aides filed a lawsuit in New York County Supreme Court, seeking to invalidate the Department of Labor Emergency Regulation that authorizes home care agencies to pay aides working 24-hour shifts for 13 hours of work (assuming 8 hours of sleep and 3 hours of meal periods are provided on such a shift). This lawsuit is yet another attempt by the same group to invalidate rules and regulations that permit (and had historically permitted) home care agencies to pay live-in aides for 13 hours of work on a 24-hour shift.

As agencies know, the saga regarding the compensation of live-in aides started several years ago, when aides began filing lawsuits that claimed they were entitled to be paid for all 24 hours of a live-in shift. The lawsuits challenged the long-standing practice of the New York Department of Labor, and Opinion Letters, that had permitted agencies to pay live-in aides for 13 hours of work on a 24-hour shift (assuming sleep and meal period requirements were met). Aides had some success in these lawsuits, with two Appellate Divisions finding that live-in aides must be paid for all 24 hours of a live-in shift. In response to the lawsuits, the Department of Labor issued an emergency regulation on October 6, 2017 (the "Emergency Regulation") to clarify the longstanding rules regarding compensation of live-in aides. Details about the emergency regulation are available in our previous alert.

In the lawsuit that was filed on Friday, the plaintiffs seek to invalidate the Emergency Regulation. If invalidated, agencies could be precluded from paying live-in aides for 13 hours of work on a 24-hour shift. In addition, plaintiffs may try to claim that, since the Emergency Regulation was never legally promulgated by the Department of Labor, aides should have been paid for 24 hours of a live-in shift starting on October 6, 2017, when the Emergency Regulation was issued.

The issues of compensating live-in aides have become highly political. On May 9, 2018, the plaintiffs and their supporters held a press conference in front of the New York Department of Labor offices in Manhattan, challenging the Emergency Regulation and the Department's willingness to support the industry. The same group also sent a letter to the Governor, asking him to rescind the Emergency

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Regulation.

Meanwhile, the Court of Appeals is slated to review whether live-in longstanding rules before the Department issued the Emergency Regulation. On March 7, 2018, the Court of Appeals agreed to decide *Andryeyeva v. New York Health Care, Inc.*, which was the first case to hold that live-in aides in New York must be paid for all 24 hours of a live-in shift. A decision, in that case, is not expected until 2019.

Also pending is a public hearing by the Department of Labor, scheduled for July 11, 2018, where the Department will receive testimony on proposed regulations regarding compensation of live-in aides.

Friday's lawsuit – if successful – could jeopardize the industry's ability to take and service live-in cases. And with less MLTC contracts available in the next few months, home care agencies will be looking to take and service live-in cases.

If you have any questions about this alert or its implications on your compensation of live-in aides, please contact any one of our Home Care Group attorneys.