

LIVE-IN AIDES CONTINUE TO GIVE EMPLOYERS SLEEPLESS NIGHTS

Wage & Hour Alert
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Yet another New York court has rejected the New York Department of Labor's longstanding 13-hour rule regarding home health aides who work 24-hour shifts (live-in aides). Under the longstanding rule, live-in home health aides may be compensated for 13 hours per day, provided they receive eight hours of sleep (five of which must be uninterrupted) and three hours for bona fide meal periods per 24-hour shift. In *Lai Chan v. Chinese-American Planning Council Home Attendant Program*, 2015 N.Y. Misc. LEXIS 3278 (N.Y. County Sup. Ct., Sep. 9, 2015), plaintiffs sought compensation for every hour of each 24-hour shift. The defendant home care agency moved to dismiss the class action complaint, in part on the basis of the DOL's longstanding 13-hour rule. The court rejected the motion and suggested that live-in aides are "entitled to 24 hours pay."

The *Lai Chan* decision comes on the heels of last year's decision in *Andryeyeva v. New York Health Care*, in which the Kings County Supreme Court similarly held that live-in aides must be paid for all hours in a 24-hour shift. *Andryeyeva* is presently on appeal before the Appellate Division, Second Department, and Hodgson Russ has submitted an amicus curiae brief on behalf of a leading industry association of home care providers in connection with that case.

The analysis of both the *Lai Chan* and *Andryeyeva* decisions have centered on the interaction between New York Department of Labor's regulation and its opinion letters interpreting those regulations. The regulation at issue provides that employees must be paid for the time they are permitted to work or are required to be available for work but that "a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours, or (2) at any other time when he or she is free to leave the place of employment." The regulations do not contain a similar sleeping time carve-out for non-residential employees. The DOL, however, has issued opinion letters stating that it would apply the 13-hour rule to both residential and non-residential employees. Despite the DOL's interpretation of its own regulations, the courts in *Lai Chan* and *Andryeyeva* have permitted class-action claims to proceed.

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While there remain compelling legal arguments that *Andryeyeva* and *Lai Chan* were wrongly decided, absent favorable decisions on appeal or further action by the state, home care agencies relying on the DOL's longstanding 13-hour rule are at risk of potential liability.

Please contact any one of our labor and employment attorneys if you have questions about this decision and its implications.