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Another Atomic Bomb Ruling in NY for the Home Care Industry

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The home health care industry suffered another major setback on September 26, 2018, when the New York Supreme Court, New York County, ruled that the New York State Department of Labor's (NYDOL) four emergency rulemaking amendments to the "13-hour rule" was "null, void and invalid." Matter of Chinese Staff and Workers Association v. Reardon, 2018 N.Y. Slip Op. 32391 (U). The amendments codified the NYDOL's longstanding interpretation that live-in home care workers only had to be paid 13 hours of a 24-hour live-in shift, as long as they received the required eight-hour sleep and three one-hour meal periods. New York labor law requires that workers get paid minimum wage for each hour worked or is required to be available. There is a narrow exception for workers who "live with" the employer, which is where the term "live-in" arose from. The argument that the Department of Labor gave in issuing the Wage Order amendments and those of us on the front lines in caring for seniors have been saying for some time is that the elimination of the exception for meal and sleep breaks will cause the collapse of the home care industry and ultimately lead to the mass institutionalization of many seniors who will not be able to pay for two twelve-hour shifts. The court summarily rejected the "collapsing and institutionalization" argument, declaring the emergency amendments to the 13-hour rule as null and void, because the arguments didn't rise to an "emergency" and therefore the NYDOL was not justified in using the State Administrative Procedures Act ("SAPA") procedures to issue the emergency amendments.

Bigger Issues at Play

It is generally accepted by many that live-in workers are not being paid for all of the hours worked. It is rare that a live-in employee receives 8 hours of sleep time plus one hour off each for breakfast, lunch and dinner. This 11-hour per day deduction is not fair to the hard-working employees who are not being paid for the time they work.

New York State (NYS) is in clear violation of the reinterpreted Fair Labor Standards Act rules enacted in 2015 (and upheld in 2017). Specifically, there are two provisions for which NYS is in violation:

- The terms live-in and sleep-in have been redefined
    - Live-in is defined as someone whose residence is that of their employer's and who has no other residence
    - Sleep-in is defined as someone who works and sleeps in their employer's residence but maintains a separate legal residence
- The companionship exemption, which offers the option to avoid paying for sleep time, is specifically not available to third-party employers, such as home care agencies. It is an option only available to direct-hire domestic household employers.

The reinterpreted federal rules were specifically designed to pay home care workers the wages they deserved.

Legal Landscape

Workers' rights are a hot topic in the political landscape, as evidenced by the passage of the NYS Paid Family Leave Act. There are many labor lawsuits making their way through the NYS court system and few wins for this industry over the last two years. The losses continue to be appealed so no final judgments have been rendered. The potential payoff for attorneys is huge since they can claim double damages, and can go back six years.

This issue can only be resolved by the NYS legislature updating their rules, many of which are over 30 years old and are out of date.

In addition, as evidenced by this ruling, the rules keep changing, which makes it very difficult to advise clients who want to comply, especially when the rules are shifting back and forth. With the likely increase in home care costs, many seniors may find themselves forced into a nursing home. The home care agencies are particularly vulnerable as they could be subject to back wages. While we don't expect the collapse of the home care industry, it certainly will cause a major shift in how home care is delivered; many will opt to pay privately, which requires very careful oversight from accountants and care managers.

On a final note, no decisions have yet been reached as is related to MLTC (managed long-term care) or CDPAP (consumer-directed personal assistance plans) providers, because these cases have not advanced through the court

system, but the cases are out there. The battle is being waged on the private pay agencies, which will continue to face scrutiny for violations of the Fair Labor Standards Act.

This is the primary factor driving why finding agencies to do live-in work has become so difficult and why Medicaid has pulled back on hours as part of the annual recertification process. This is also a leading reason why GuildNet has pulled out of the market, as of November 1, 2018.

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