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Andryeyeva and the Minimum Wage for Home Health Aides

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When it comes to the minimum wage, there are usually two different perspectives. On the one hand, people argue that employees need to be paid a living wage. On the other hand, people argue that if businesses have to pay more, they will hire fewer employees or close their doors. This tension is front and center in the recent *Andryeyeva v. New York Health Care* litigation involving home health aides ("HHAs").[1]

In *Andryeyeva*, a 5-2 opinion, the Court of Appeals adopted the Department of Labor's ("DOL's") reading of New York's Miscellaneous Industries and Occupations Minimum Wage Order ("Miscellaneous Wage Order"). Under that reading, employers only have to pay HHAs for 13 hours of a 24-hour shift if the HHAs are provided with scheduled and uninterrupted breaks lasting 11 hours. *Andryeyeva* is an important decision for Westchester and for all of New York.

The DOL and the Miscellaneous Wage Order

On its face, the Miscellaneous Wage Order provides the following general rule for paying minimum wage:

> The minimum wage shall be paid for the time an employee is permitted to work, or is required to be available for work at a place prescribed by the employer . . . .[2]

The Miscellaneous Wage Order also has a rule directed at "residential employees":

> [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 [the employee's] normal sleeping hours . . . . ; or (2) at any other time when he or she is free to leave the place of employment.[3]

The DOL announced in a March 2010 opinion letter that it would "appl[y] the same test" to determine compensable hours for both residential HHAs and non-residential HHAs working 24-hour shifts.[4] Under the DOL's test, HHAs are entitled to be paid the minimum wage for 13 hours of work if they are given an 8-hour sleep break and a 3-hour meal break, and if they are not interrupted during those break periods.

The Appellate Division Weighs In

In *Andryeyeva*, a class action brought on behalf of HHAs, the Second Department considered whether the DOL's treatment of residential and non-residential HHAs is consistent with the Miscellaneous Wage Order. The Second Department held that the DOL's position is "contrary to the plain meaning" of the Miscellaneous Wage Order, and "neither rational nor reasonable."[5]

The Second Department reasoned that since non-residential HHAs are "required to be available for work" during their breaks, they are entitled to be paid the minimum wage during their break hours.

Emergency Rulemaking

It did not take long for the DOL to push back. Roughly one month after the Second Department's decision in *Andryeyeva*, the DOL issued a Notice of Emergency Rulemaking designed to "prevent the collapse of the home health care industry, and avoid institutionalizing patients who could be cared for at home[.]" The regulation stated that HHAs working 24-hour shifts would not need to be

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paid minimum wage for certain meal periods and sleep times identified in the federal Fair Labor Standards Act and its regulations. Of note, the federal regulations allow employers to "exclude" from compensable time an HHA's sleeping period of up to 8 hours if it is "regularly scheduled."[6]

The emergency regulation was subsequently challenged in Supreme Court, New York, and struck down on September 25, 2018, after the court found that the record before it did not reflect an emergency.[7]

The Court of Appeals Decides *Andryeyeva*

On March 26, 2019, the Court of Appeals decided *Andryeyeva*.

The *Andryeyeva* majority believed that the DOL's interpretation of the Miscellaneous Wage Order was rational, even if not "the most natural reading of the regulation."

The Court began by focusing on the language, "required to be available for work at a place prescribed by the employer," which appears in what I refer to above as the "general rule." The Court divided the language into two separate phrases: "available for work" and "at a place prescribed by the employer."

In interpreting the plain text of the Miscellaneous Wage Order, the Court reasoned that "at a place prescribed by the employer" conveys presence, so "available for work" must mean something else to avoid surplusage. In the context of HHAs, the DOL read "available for work" to "exclude the hours when the employee is not working because the employee is on a scheduled sleep and meal break." This interpretation was, the majority explained, both consistent with the DOL's longstanding position and based on the DOL's expertise. Also, such interpretation harmonizes New York and federal law. For these reasons, the Court deferred to the DOL.

Judge Garcia dissented. He argued that the majority ignored the distinction in the Miscellaneous Wage Order between residential and non-residential employees. He explained:

> [b]y providing that, for residential employees, sleep hours *do not* constitute time the employee is "available for work," the exception signifies that, for all other employees, sleep hours *do* constitute time they are "available for work"—and, accordingly, must be paid. (emphasis in original).

On Judge Garcia's reading, non-residential HHAs working 24-hour shifts are "available for work" during their breaks and therefore must be paid the minimum wage for their breaks.

What Happens Next

The Court of Appeals reversed the Appellate Division on its interpretation of the Miscellaneous Wage Order, but the case was remitted to the Supreme Court for purposes of evaluating class certification: Is there a class to certify?

The certifiability of a class depends on the existence of common, as opposed to individualized, questions. The *Andryeyeva* defendants will argue that common issues are lacking. In particular, they will argue that under *Andryeyeva*, since non-residential HHAs are only entitled to 24 hours worth of pay if their meal and sleep breaks are interrupted, the question of whether any particular HHA's breaks are interrupted during a particular shift necessarily requires an individualized analysis.

But the plaintiffs in *Andryeyeva* will argue that class certification remains viable. They will focus on how the *Andryeyeva* majority appeared to have gone out of its way to address certification, even though the issue was not necessary to the decision. In particular, the Court of Appeals stated that, "plaintiffs' allegations suggest a policy or practice of unlawful action of the type our courts have previously found ripe for class treatment."

Conclusion

While *Andryeyeva* involves the abstract doctrines of statutory construction and class certification, the underlying issues are as practical as it gets. For HHAs, the case is about compensation for long hours they spend providing an important service. For home health care companies and their patients, the case is about the viability of New York's home health care industry. So the stakes are high all around. Attention—like the wages required by the Miscellaneous Wage Order—must be paid.[8]

Endnotes

1 *Andryeyeva v. N.Y. Health Care, Inc.*, 2019 NY Slip Op 02258 (N.Y. Mar. 26, 2019).

2 12 NYCRR 142-2.1(b).

3 *Id.*

4 Opinion Letter from Maria L. Colavito, Counsel, DOL, Mar. 11, 2010.

5 *Andryeyeva v. N.Y. Health Care, Inc.*, 153 A.D.3d 1216, 1218-19 (2d Dep't 2017).

6 29 C.F.R. 785.22(a).

7 *Matter of Chinese Staff and Workers Ass'n v. Reardon*, 2018 NY Slip Op 32391(U) (Sup. Ct., NY County, Sept. 25, 2018).

8 The line, "Attention must be paid," comes from the play *Death of a Salesman* by Arthur Miller.

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