



## Live-In Home Care Aide Wages **Court Rules Non-Residential Aides Must Be Paid During Breaks**

On April 11, New York's Appellate Division, First Department, [denied](#) a home care agency's motion to dismiss a lawsuit filed by a home care aide who claimed she was not paid for 24 hours when she worked live-in shifts. In *Tokhtaman v. Human Care, LLC et al.*, the court found that New York's labor regulations require home care aides to be paid for each hour they are required to be available at a place prescribed by the employer, unless they are residential employees (living on the employer's premises).

By regulation, residential employees do not have to be paid for normal sleeping hours or when they are permitted to leave the site. The court rejected the defendant agency's reliance on a 2010 Department of Labor ([DOL](#)) opinion letter stating that live-in aides only need to be paid for 13 hours per 24-hour period (provided they receive at least 8 hours for uninterrupted sleep and 3 hours for meals). DOL's opinion letter did not distinguish between residential and non-residential aides, applying the "13-hour rule" to both. The court said that in applying the rule to non-residential aides, the opinion letter conflicted with the State's regulations and should not be followed in this case.

The court found that the plaintiff aide could recover unpaid wages for the remaining 11 hours of each shift if she proves that she was a non-residential employee during the shift dates in question. Moreover, the court decided that the aide could sue as a third-party beneficiary of contracts between the agency and government requiring the agency to pay the aide wages in accordance with the Wage Parity Law.

If this decision is upheld by the Court of Appeals (or if the court chooses not to review it), home care agencies will likely face more lawsuits from non-residential aides in the future over alleged failure to pay for every hour of a 24-hour shift. All home care agencies should now be considering their strategies for addressing this issue.

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