



Live-In Home Care Update **DOL Issues Emergency Rule**

On October 6, the New York State Department of Labor (DOL) issued an [emergency rule](#) intended to protect home care providers from potential liability stemming from the recent court decisions on the "13-hour rule."

The emergency rule, which expires on January 3, 2018, states that a home care aide who works a shift of 24 hours or more does not need to be paid for meal periods and sleep times that are excluded from hours worked under the federal Fair Labor Standards Act (FLSA). This effectively means that live-in aides who receive eight hours of sleep (at least five of which are uninterrupted) and three one-hour meal breaks completely relieved of duty only need to be paid for the remaining 13 hours worked.

In the *Tokhtaman*, *Andryeyeva* and *Moreno* cases, the Appellate Division, First and Second Departments, both found that providers must pay for every hour of a 24-hour shift, except for residential aides who live only at the place of their employer. In doing so, they held that the DOL's 2010 opinion letter on the 13-hour rule was inconsistent with DOL regulations, and thus invalid.

On October 25, the emergency rule was published in the [State Register](#) along with the required Regulatory Impact Statement. The DOL stated, in part:

"The purpose and intent of this emergency rulemaking is to narrowly codify the Commissioner's longstanding and consistent interpretation of Article 19 of the Labor Law and to make clear that the amended regulations shall not be construed to require that the minimum wage be paid for meal periods and sleep times that are excluded from hours worked under the federal minimum wage laws and regulations for home care aides who work shifts of 24 hours or more. The Department anticipates this will have a positive impact on small businesses as it will eliminate any instability introduced by decisions recently issued by the State Appellate Divisions."

The DOL indicated that it intends to adopt the emergency rule as a permanent rule. With that in mind, the DOL said it would publish a notice of proposed rule-making at a future date.

The defendants in the *Tokhtaman*, *Andryeyeva* and *Moreno* cases are currently seeking leave to appeal the previous Appellate Division decisions to the Court of Appeals, New York's highest court. That court has not yet decided whether to hear the cases.

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