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70 Grand Avenue  
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**NEW YORK'S SECOND DEPARTMENT POISED TO DECIDE TWO  
APPEALS CONCERNING VIABILITY OF HOME HEALTH AID CLASS  
ACTIONS**

By  
Kevin J. O'Connor\*

On January 9, 2017, New York's Second Judicial Department, Appellate Division, will hear argument in two appeals that are of significant interest in the home health care field. In Moreno v. Future Care Health Svcs., Inc., 2015 WL 1969753, 2015 N.Y. Slip Op. 31752(U) (Kings Cty. May 4, 2015), the Court denied a motion for class certification by several home health aides ("HHAs") who claimed entitlement to minimum wage, spread of hours and overtime pay for 24-hour "live in" shifts. The Court relied Severin Severin v. Project OHR, Inc., 2012 WL 2357410 \* 9-9 (S.D.N.Y.2012) and gave deference to a New York Department of Labor ("DOL") Opinion Letter in rejecting the notion that a flat per diem rate for a live in shift was impermissible, provided the HHAs were paid for 13 hours of work, and where the amount paid to them satisfied the spread of hours test. Since the plaintiffs in that case failed to make any representation about their own ability to sleep or rest while working the sleep in shifts, and since any such claim would defeat an ability to proceed on a class basis in any event, the Court refused to allow certification of the class. The plaintiffs have appealed, and the case will be argued on January 9, 2017.

Prior to the decision in Moreno, in a decision which the Court in Moreno refused to follow, the trial court in Andryeyeva v. New York Health Care, Inc., 45

Misc.3d 820, 994 N.Y.S.2d 278 (Sup. Ct. Kings Cty 2014) granted class certification of a proposed class of HHAs. Similarly, in Lai Chan et al. v. Chinese–American Planning Council Home Attendant Program, Inc., 50 Misc.3d 201, 21 N.Y.S.3d 814 (Sup. Ct. New York Cty 2015), the court denied a motion to dismiss. In both cases, the courts refused to give deference to the DOL’s opinion letter and refused to follow Severin.

In Andryeyeva, which is stayed and on interlocutory appeal (Docket No. 2014-09087), the plaintiffs sought to certify a class of HHAs that provided home health care services during the course of 24 hour shifts. The plaintiffs alleged that the defendant home health care agency violated the New York Labor Law by failing to pay them for the entire 24 hours that they remained at the client’s home. Specifically, the defendant did not pay the plaintiffs for sleep and meal time breaks. In opposition to the motion, the defendant argued that a DOL March 11, 2010 opinion letter permitted it to pay the plaintiffs up to 13 hours over the course of a 24 hour period and withhold payment of wages of up to 11 hours over the course of the same period constituting 8 hours for sleep time breaks and 3 hours for meal time breaks.

The motion court disagreed with the defendant’s argument and refused to give deference to the DOL’s opinion letter. The motion court provided no supporting authority for its findings, and simply held that the DOL opinion letter exemptions did not apply because plaintiffs maintained their own homes and did not physically reside at the home of their clients. See also Andryeyeva v. New York Health Care, Inc., 2013 WL 9862249\* 11 (Sup. Ct. Kings County 2013).

Similarly, the decision in Lai Chan, which was issued in the context of a CPLR § 3211 motion to dismiss, adopted the reasoning in Andryeyeva by holding that the March 11, 2010

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opinion letter solely applied to HHAs that physically reside at the home of their clients. Both motion courts' decisions in Andryeyeva and Lai Chan are problematic because they fail to give proper deference to several DOL opinion letters and the clear language of pertinent regulations relied upon by the industry, which would demonstrate that HHAs who provide home health care services during the course of 24 hour shifts are in fact "live-in" employees subject to the sleep and meal time break exemptions.

Only time will tell how the Second Department will rule on these issues in Moreno and Andryeyeva. Several industry groups, including Leading Age, have filed amicus briefs in support of the views advocated by home health care providers.

\*Kevin J. O'Connor, Esq. is a shareholder with Peckar & Abramson, PC, a national law firm, and focuses his practice on EPL, D&O, and class action defense, and is admitted to practice in state and federal courts in New York, New Jersey and Pennsylvania. He is resident at its River Edge, NJ office. The views expressed herein are those of the author and not necessarily those of P&A. P&A is counsel of record to one defendant in Moreno and is handling numerous class actions and collective actions on behalf of health care providers.