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TANYA HOBSON-WILLIAMS: Court rulings could lead to more compensation and higher costs for around-the-clock aides.

## Courts rule 24-hour aids must be paid per hour

By: Claude Solnik | October 16, 2017 | 0

In two New York State Appellate court decisions, a panel of judges ruled that around-the-clock home aides should be paid at least minimum wage per hour, potentially leading to far more compensation for these workers.

The Sept. 13 decisions in two cases in the Second Department of the Appellate Court of New York, which includes Long Island, found that workers couldn't be paid for only part of the 24-hour shift or a flat fee, unless it's at least equal to minimum wage for the full 24 hours.

The court ruled that employers couldn't refuse to pay for time that the workers might spend sleeping or eating, because they were technically available to be called upon.

It's a huge change that could mean bigger payments to the firms who hire these live-in aides and the workers themselves, as well as lead to increases in the cost for those paying for the service.

"It's going to have a major impact, depending on the ultimate order," said Tanya Hobson-Williams, a sole practitioner at Hobson-Williams in Jamaica Estates. "The cases don't say how they have to pay this back or how far they have to retroactively pay these people."

The decisions also cleared the way for the cases to seek class action status, which, if the decisions are upheld by the New York State Court of Appeals, could open the door to litigation from thousands of workers who say they were paid below minimum wage.

"It does not limit it to going forward. They could absolutely allege that they're entitled to retroactive pay," Hobson-Williams said. "These agencies could be exposed to potential claims for the past. And going forward, they'd have to pay 24-hour, live-in aides for the minimum wage for 24 hours. The cost of the care will go up for the agency and anyone who pays privately."

While the decision could be appealed and overturned, it at least leaves a very real possibility that the cost of 24-hour care will increase – and no longer be prorated for time spent sleeping and eating.

"Personal assistance is a critical service needed by a lot of severely disabled individuals," John Kemp, president and CEO of the Viscardi Center, a disability education and employment training center based in Albertson, said. "We want to make sure they have the human support needed to live a meaningful life." ^

He said, regardless of the outcome of the case, it's important that 24-hour care remain in place for many people who need it.

"It allows people to remain in their home instead of being forced into a nursing home," Hobson-Williams added.

The minimum wage is \$11 per hour in Nassau, Suffolk and Westchester until Dec. 31, 2017 or \$264 for 24 hours, after which the rate rises to \$13 per hour.

The minimum age for small employers with 10 or fewer workers is \$10.50 an hour or \$252 a day through Dec. 31, 2017, after which it is \$12.

According to Genworth Financial's Cost of Care Survey, the median annual cost of a home health aide in New York State this year is \$54,340, with an annual growth rate of 2 percent over the last five years.

"This decision, unless overturned on appeal, will definitely affect the home care services industry," Hobson-Williams said. "For those families who privately pay for home care services, their out-of-pocket costs will double."

The practice of paying for only part of the full 24 hours dates back to a March 11, 2010, New York State Department of Labor opinion letter, indicating live-in employees "must be paid not less than for 13 hours per 24-hour period provided that they are afforded at least eight hours for sleep and actually receive five hours of uninterrupted sleep, and that they are afforded three hours for meals."

"They're called live ins, which means they spend the night. However, they're not residential workers. They have a separate residence," Hobson-Williams said. "Because you have a separate residence, which most 24-hour, sleep-in aides do, they're not residential employees. They're not required to be paid the minimum wage for every hour they work."

But in *Andryeyeva v New York Health Care*, the Appellate Court on Sept. 13 ruled that the aides were "required to be at the clients' residences and were also required to perform services there if called upon to do so."

To argue they weren't "required to be available for work" because it turned out that they were not called upon to work is "contrary to the plain meaning" of "available," the court ruled.

The workers, therefore, "were entitled to be paid the minimum wage for all 24 hours of their shifts, regardless of whether they were afforded opportunities for sleep and meals."

"The decision says because you are available to provide the service, you have to be paid minimum wage for the 24 hour shift," Hobson-Williams said. "Prior to this decision, home care instances paid 13 hours minimum wage."

Employers assumed that aides slept for eight hours and set aside three hours for meals. But this wasn't the only decision that upheld more money for live-in aides.

In *Moreno v. Future Care Health Services*, with a decision also issued the same day, the court found that a flat fee also violated the workers' rights, because it fell short of minimum wage per hour.

The panel concluded that the plaintiffs in the case were right and that the fee "was below the minimum wage in violation of the Labor Law."

While private insurance often picks up 24-hour care, the biggest provider of these around-the-clock services is Medicaid, Hobson-Williams said. Medicare does not cover long-term home care services.

"Medicaid is going to have to look at how they pay agencies which provide long-term care services. Currently, they pay the agencies a capitated rate," Hobson-Williams said. "If the agency's costs have gone up, they'll look to Medicaid to cover those costs and increase the pay."

Hobson-Williams said if the ruling is upheld, that could lead to a more sparing reliance on 24-hour service.

"Because the costs are going to increase, the ability to provide 24-hour, live-in to people who need it will decrease," Hobson-Williams said. "If you can't afford it, you'll be forced not to use full-time care. If someone needs someone in those 24 hours and can't afford to pay it, you reduce the care that leaves people vulnerable."

She said many people already pay workers off the books. If the recent decisions are upheld, that could lead to a bigger shift to off-the-books hiring.

She said that “there have been reports that managed long-term care agencies are not taking new cases, presumably because of the court ruling.”

Hobson-Williams said family members should take long-term care policies or life insurance policies with a long-term care clause.

“These are good options, provided they are obtained by at least the age of 50,” she said. “That way, you are covered and you will be paying lower premiums.”

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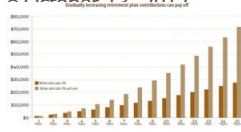
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