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Services for Live-in Home Care

On April 11, 2017, in *Tokhtaman v. Human Care, LLC*, 2017 N.Y. App. Div. LEXIS 2703, 2017 NY Slip Op 02759 (1st Dept. 2017), the New York State Appellate Division, First Department, held that a home care services aide may be entitled to compensation for the hours she worked in excess of 13 hours a day if she can demonstrate that she is a “nonresidential” employee.

The court declined to determine whether Plaintiff—who alleged that she “generally worked approximately 168 hours per week” as a home care services aide—was in fact a residential or nonresidential employee. Rather, the court indicated that it could not make such a determination, prior to discovery, as a matter of law.

While *Tokhtaman* represents the first significant opinion from the Appellate Division on this issue, several related Supreme Court (trial level) opinions from different venues have been released in recent years.¹ These cases have addressed the issue from similar and differing factual contexts, and have come to a range of conclusions, at least one of which is currently on appeal. The Departments of Health (DOH) and Labor (DOL) have been monitoring these cases, and will continue to evaluate whether action may be needed to prevent unnecessary disruption to home care services in New York State.

However, pending a final resolution of this matter by the courts, or until notice is otherwise given, DOH and DOL expect providers to continue staffing and covering live-in cases in accordance with current Managed Care contracts, Medicaid agreements, MLTC Policy 14.08, and all applicable labor requirements. Live-in cases should not be converted to 24-hour continuous split-shift care unless the individual meets the criteria for this higher level of care.

¹ *Moreno v. Future Care Health Servs., Inc.*, 2015 NY Slip Op 31752(U), ¶¶ 7-8 (Sup. Ct.); *Lai Chan v. Chinese-Am. Planning Council Home Attendant Program, Inc.*, 2015 NY Slip Op 25308, ¶ 6, 50 Misc. 3d 201, 215, 21 N.Y.S.3d 814, 828 (Sup. Ct.); *Andryeyeva v. N.Y. Health Care, Inc.*, 2014 NY Slip Op 24269, ¶ 4, 45 Misc. 3d 820, 827-28, 994 N.Y.S.2d 278, 285-86 (Sup. Ct.).