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Sleeping On the Job... Again? Second New York Appellate Court Finds Home Healthcare Employees Entitled to Pay for all 24 Hours on an Overnight Shift

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Seyfarth Synopsis: *The Supreme Court of the State of New York, Appellate Division, Second Judicial Department (“Second Department”) joined the First Department in finding that home healthcare employees who work 24-hour shifts are entitled to pay for all hours present in a client’s home, including sleeping and meal periods. With this holding, the Second Department became the second appellate court in New York to reject the previously accepted interpretation of New York law, consistent with federal law, that allowed employers to pay home health care employees for 13 hours out of a 24-hour shift, so long as specified meal and sleep periods were provided.*

We previously wrote about the New York appeals court decision in [Tokhtaman v. Human Care, LLC](#), in which the New York State Supreme Court, Appellate Division, First Judicial Department (Manhattan and the Bronx), held that a “non-residential” home healthcare employee must be paid for all hours present at a client’s home, including meal periods and time spent sleeping. The First Department opined that “non-residential” employees are those employees who, like the plaintiff in *Tokhtaman*, “maintain[] [thei]r own residence, and d[o] not live in the homes of [] client’s.”

On September 13, 2017, the Second Judicial Department (Dutchess, Kings, Nassau, Orange, Putnam, Richmond, Rockland, Suffolk, and Westchester) issued two decisions in line with *Tokhtaman*, holding that non-residential home healthcare employees must be paid for all 24 hours in a 24-hour shift, regardless of meal and sleep periods. The Second Department did not provide any further clarity as to what constitutes a “residential” home healthcare employee.

These decisions reflect a departure from the rationale set forth in a [2010 New York Department of Labor \(“DOL”\) Opinion Letter](#), which interpreted the DOL Regulation 12 NYCRR § 142-2.1(b) to allow “live-in employees” -- whether or not they are residential employees -- to be paid for 13 hours for a 24-hour shift so long as the employee was afforded at least 8 hours for sleep (and actually received 5 hours of uninterrupted sleep), and 3 hours for meals.

With both the First and Second Departments in agreement on the issue, however, employers in New York should be aware of these changing and increasingly onerous pay obligations for employees working 24-hour shifts.

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