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## Appellate Court ruling has home care agencies on edge

By **DAN GOLDBERG** | 04/18/17 06:49 PM EDT

A state Appellate Court decision has home care agencies on edge as they await the outcome of a lawsuit that could cost the state hundreds of millions of dollars and upend the industry.

Nina Tokhtaman was a live-in home health aide working for Human Care, a Brooklyn-based home care agency. She would often stay with clients 24 hours a day, seven days a week.

Home care agencies, relying on a 2010 opinion from the state's Department of Labor, have typically paid employees like Tokhtaman for 13 hours of work, assuming that they are allowed eight hours of sleep and three hours for meals. The agency makes clear that if residential employees do not receive that time to eat and sleep they should be paid for those hours.

Tokhtaman filed a lawsuit, telling state Supreme Court Justice Carol Edmead that she maintains her own residence and because she can't leave her client's side she should be paid for all 24 hours she is on call in the home.

Attorneys representing Human Care filed a motion to dismiss the case, arguing that agencies were just following Department of Labor guidelines and that it was absurd to argue that Tokhtaman could work 24 hours a day, seven days a week, and claim that she wasn't a "residential employee," a class of workers that state regulations exempt from the normal minimum wage laws.

Edmead disagreed, as did the First Department of the Appellate Division. In a ruling last week, the court found that the 2010 opinion letter from the Department of Labor conflicted with the plain meaning of state regulations, by broadening the category of people who only need be paid 13 hours to "live-in employees" regardless of whether they were residential or non-residential.

At issue is how much deference the courts should give to agencies to interpret their own regulations, a topic playing out in federal courts as well. The answer from the Appellate Court in this case appears to be, not much.

"We find that the DOL opinion conflicts with [the regulation] insofar as the opinion fails to distinguish between 'residential' and 'nonresidential' employees, and should thus not be followed in this respect," the Appellate Court ruled. "[I]f [she] can demonstrate that she is a nonresidential employee, she may recover unpaid wages for the hours worked in excess of 13 hours a day."

This is what truly frightens home care agencies. The decision only allows the case to move forward but if Thokhtaman's argument — that she is a nonresidential employee because she maintains her own residence — holds up in court, it would mean almost no one who isn't a family member would qualify as a residential employee.

That would mean home care agencies would have to pay employees for 24 hours, instead of 13 hours.

"This has the potential to be devastating," said Bryan O'Malley, executive director of the Consumer Directed Personal Assistance Association of New York State. "I don't think anyone's worst nightmare had this playing out like this."

A ruling in Tokhtaman's favor could mean home care agencies would be required to provide years of back pay to thousands of employees. The state Department of Health would almost certainly have to intervene and provide more Medicaid funding to the agencies to pay for the increased hours. Those who don't rely on Medicaid would have to pay for the increase out of their own pocket.

"The cost differences are staggering," said Al Cardillo, executive vice president for the Home Care Association of New York State. "This would have major implications."

A favorable ruling for Tokhtaman would also come as the state is implementing a higher minimum wage, which already has increased what the state government, through the Medicaid program, is paying for direct care workers.

And her case is but one of several working their way through the courts.

Equally concerning to home care agencies is a 2014 decision from Brooklyn Supreme Court Justice Carol Demarest, who ruled that for those who "maintain their own homes and merely serve their clients' needs sporadically overnight, the reasoning of the 2010 DOL opinion ... does not apply."

That case is on appeal in the Second Department. Oral arguments were held in January and all sides are awaiting a ruling.

