SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Matter of GUI ZHU CHEN, YA YUN LI, MARIA RODRIGUEZ, GUI HUA SONG and CHUN FENG ZHUANG,

On behalf of themselves and all others similarly situated,

Petitioners,

-against-

Index No. 908146/23

ROBERTA REARDON, as Commissioner of the New York State Department of Labor,

Respondent.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS VERIFIED PETITION

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

BACKGROUND 3

The Petitioners 3

Mandatory Arbitration 5

NYSDOL Closes Cases Pursuant to a New Rule 6

ARGUMENT 9

I. THE NYSDOL'S DETERMINATIONS TO CLOSE PETITIONERS' INVESTIGATIONS WERE AFFECTED BY ERRORS OF LAW 9

A. The NYSDOL Based Its Determinations on an Unlawfully Promulgated Rule. 9

B. The Determinations Were Based on an Erroneous Legal Conclusion. 12

II. THE NYSDOL'S DETERMINATIONS ARE ALSO ARBITRARY AND CAPRICIOUS. 14

A. The Determinations Arbitrarily Deviate from the NYSDOL's Prior Stated Course of Action. 15

B. The Determinations Have No Rational Relationship to the Evidence Obtained or to the Minimum Wage Act. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Andryeyeva v. New York Health Care, Inc.,
33 N.Y.3d 152 (2019) 1, 2

Collins v. Governor's Office of Employee Relations,
211 A.D.3d 1001 (3d Dep't 1995) 17

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 12

Era Steel Const. Corp. v. Egan,
145 A.D.2d 795 (3d Dep't 1988) 17

Leggio v. Devine,
34 N.Y.3d 448 (2020) 15

Matter of Alca Indus., Inc. v. Delaney,
92 N.Y.2d 775 (1999) 10

Matter of Charles A. Filed Delivery Serv.,
66 N.Y.2d 516 (1985) 15

Matter of Cordero v. Corbisiero,
80 N.Y. 2d 771 (1992) 10, 11

Matter of Liquidation Union Indem. Ins. Co. of NY,
92 N.Y.2d 107 (1998) 15

Matter of New York City Tr. Auth. v. New York State Dept. of Labor,
88 N.Y.2d 225 (1996) 10, 11

Matter of Peckham v. Calogero,
12 N.Y.3d 424 (2009) 17

Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty.,
34 N.Y.2d 222 (1974) 17

Matter of Nehorayoff v. Mills,
95 N.Y.2d 671 (2001) 17

Matter of Roman Catholic Diocese of Albany v. New York State Dept. of Health,
66 N.Y.2d 948 (1985) 10, 11

Matter of Schartfigure v. Hartnett,
88 N.Y.2d 296 (1994) 10

Matter of Teresian House Nursing Home Co. Inc. v. Chassin,
218 A.D.2d 250 (3d Dep't 1996) 10-11

People v. Maplebear, Inc.,
81 Cal.App.5th 923 (2022) 13

People ex rel. Cuomo v. Coventry First LLC,
13 N.Y.3d 108 (2009) 13

Prima Paint Corp. v. Flood & Conklin Mfg. Co.,
388 U.S. 395 (1967) 12

Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n,
843 N.W.2d 727 (Iowa 2014) 13

Scalia v. CE Security LLC,
21-CV-00057 (AMD)(RLM), 2021 WL 3774189 (E.D.N.Y. Aug.25, 2021) 13

Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Srvcs.,
77 N.Y.2d 9

State ex rel. Hatch v. Cross Country Bank, Inc.,
703 N.W.2d 562 (Minn. Ct. App. 2005) 13-14

Wooley v. New York State Dep't of Corr. Servs.,
15 N.Y.3d 275 (2010) 17

Statutes

N.Y. Lab. Law § 196 14

N.Y. Lab. Law § 650 18

N.Y. SAPA §102 9

N.Y. SAPA § 202 ..... 10, 11

Other Authorities

CPLR 7801 9

CPLR 7803 9

CPLR 7806 9

PRELIMINARY STATEMENT

Petitioners and the putative class members are current or former home care aides who provide live-in services to elderly, vulnerable, and disabled Medicaid recipients. To provide this care, Petitioners and class members work multiple consecutive 24-hour shifts per week. Petitioners and class members are victims of wage theft. Though they never receive five hours of continuous, uninterrupted sleep or three full hours of meal breaks per shift, their employers pay them for no more than 13 hours per 24-hour shift in violation of the New York Labor Law, as set forth by the Court of Appeals. *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 182 (2019). As a result, they are paid less than the minimum wage and receive little to no overtime pay.

Since 1980, the New York State Department of Labor ("NYSDOL") has advised employers of home care aides that they may lawfully discharge their obligations under the Minimum Wage Act by paying "live-in" home care aides who work 24-hour shifts for only 13 hours of their shifts, so long as the aides receive eight hours of sleep (five of which must be uninterrupted) and three hours of meal breaks. Affirmation of Carmela Huang in Support of Petitioners' Article 78 and Motion for Class Certification ("Huang Aff.") Exhibit ("Ex.") 42, July 14, 1995, Letter; Ex. 46, Mar. 11, 2010, Letter. The NYSDOL has defended this interpretation of its regulations, known as the "13-hour rule," by claiming that its rule has a "hair trigger." "Thus, even if a home health care aide sleeps without interruption for four hours and 59 minutes, but is not able to obtain five full hours of sleep, [NYS]DOL mandates the employer pay for the entire eight hours allotted for sleep." *Andryeyeva*, 33 N.Y.3d at 182.

In reality, though, the NYSDOL has not properly enforced the hair trigger, so that home care aides remain mired in economic insecurity, often living below the poverty line and reliant

on public benefits to survive. For want of enforcement by the NYSDOL, home care aides – primarily immigrant women of color – cannot escape wage exploitation. Assigned to grueling 24-hour shifts, they work continuously around the clock, often for days at a time, while earning less than the minimum wage per hour.

This petition concerns the NYSDOL's latest action that deprives home care aides of "merely a chance to win what they have already earned: a day's wages for a day's work." *Andryeyeva*, 33 N.Y.3d at 197. Prevented from enforcing their rights through litigation by their unions' decisions to enter into mandatory arbitration agreements with their employers, Petitioners and the class members sought the help of the NYSDOL. Petitioners and the class members filed with the agency complaints of unpaid wages, overtime, spread of hours, and in some cases, even retaliation. Their cases were accepted and, to varying degrees, investigated, even while a large-scale union arbitration was pending, leading the NYSDOL to conclude that the evidence was "overwhelmingly corroborative" of the aides' allegations that their employers had systematically violated the New York Labor Law. Despite the success of its investigation and evidence of these clear and knowing violations, in April and May of this year, the NYSDOL nevertheless arbitrarily reversed course and closed Petitioners' and class members' investigations after the large-scale arbitration resulted in meager awards amounting to less than pennies on the dollar and no ongoing relief.

Seeking to justify its arbitrary about face, the NYSDOL has since announced an unlawful rule based on its specious legal conclusion that private arbitration agreements supersede its power to enforce the Minimum Wage Act. As a result, hundreds of home care aides have been arbitrarily deprived of their only meaningful option to receive full payment for the wages they are owed. Meanwhile, the violations continue unchecked.

Petitioners ask this Court to order the NYSDOL to reopen their cases and conclude its investigations.

BACKGROUND

The Petitioners

Petitioner Gui Zhu Chen was employed by Chinese-American Planning Council Home Attendant Program, Inc. ("CPC") as a home care aide from approximately March 2013 to October 2020. VP ¶¶ 36, 45. Throughout her employment, Ms. Chen worked three or four consecutive 24-hour shifts per week providing care to Ms. L., an elderly woman who was diagnosed with dementia and required toileting assistance approximately every 30 minutes to one hour during the night. *Id.* ¶¶ 37-39. Ms. Chen never slept for five uninterrupted hours per shift. *Id.* ¶ 40. She never received three hours of completely duty-free meal breaks. *Id*. Nevertheless, CPC never paid Ms. Chen for more than 13 hours per shift. *Id.* Additionally, CPC calculated Ms. Chen's overtime pay based on the fiction that she worked only 13 hours per shift. *Id.* ¶ 41. CPC fired Ms. Chen in retaliation for her efforts to obtain proper compensation under the NYLL. *Id.* ¶¶ 42-45. Petitioners estimate that Ms. Chen is owed approximately $171,000 in unpaid wages, not including liquidated damages and interest. *Id.* ¶ 35.

Petitioner Ya Yun Li has been employed as a home care aide by People Care, Inc. ("People Care") since September 2007. *Id.* ¶¶ 46-47. For the sixteen years she has worked for People Care, Ms. Li has worked 24-hour shifts exclusively, providing care to Ms. Y., a woman who is now 105 –years old. *Id.* ¶¶ 46, 48. Until September 2021, Ms. Li worked four consecutive 24-hour shifts per week. *Id.* ¶ 47. Since then, she has worked between two and three consecutive 24-hour shifts per week. *Id*. Ms. Li has always only been paid 13 hours per shift, even though she has never slept more than one or two hours per shift and has never had more than a few minutes

to eat her meals. *Id.* ¶¶ 49-50. Ms. Li is owed at least $249,000 in unpaid wages as of the filing of the Petition, not including liquidated damages and interest. *Id.* ¶ 46.

Petitioner Maria Rodriguez was employed as a home care aide by First Chinese Presbyterian Community Affairs Home Attendant Corporation ("First Chinese Presbyterian") from approximately 2002 to 2020. *Id.* ¶ 54. Between March 2016 and January 2020, Ms. Rodriguez provided care to Ms. R., an elderly woman with dementia. *Id.* ¶¶ 55-56. For two or three consecutive 24-hour shifts per week, Ms. Rodriguez had to monitor Ms. R. constantly to ensure that she did not leave the apartment or slip and fall while wandering around the home. *Id.* Ms. Rodriguez also assisted Ms. R. with toileting as often as ten times per night. *Id.* ¶ 56. Ms. Rodriguez never received five hours of continuous, uninterrupted sleep or three hours of completely duty-free meal breaks per shift, but Ms. Rodriguez was never paid for more than 13 hours per shift. *Id.* ¶¶ 54, 56. She never received any overtime wages. *Id.* ¶ 54. Petitioners estimate Ms. Rodriguez is owed approximately $80,000 in unpaid wages, not including liquidated damages and interest. *Id.* ¶ 53.

Petitioner Gui Hua Song was also employed by First Chinese Presbyterian. *Id*. ¶ 59. Ms. Song worked 24-hour shifts as a home care aide for over a decade, starting in 2009. *Id.* From November 2013 until February 2019, Ms. Song worked two consecutive 24-hour shifts per week, providing services to Ms. C., an elderly woman whose formal care plan required turning and repositioning of her body every two hours including throughout the night. *Id*. ¶ 60. Between June 2019 and September 2020, Ms. Song worked three or four consecutive 24-hour shifts per week providing services to Ms. E., an elderly woman with dementia who suffered from insomnia. *Id*. ¶¶ 63-64. In addition to monitoring Ms. E. constantly to ensure that Ms. E. did not harm herself or wander out of her home, Ms. Song also assisted Ms. E. with toileting approximately

two to three times each night. *Id*. ¶ 64. Throughout her employment, Ms. Song was never paid for more than 13 hours per shift, and only her compensated hours were used to calculate her overtime pay. *Id*. ¶ 65. It is estimated that Ms. Song is owed approximately $164,000 in unpaid wages, excluding liquidated damages and interest. *Id.* ¶ 58.

Petitioner Chun Feng Zhuang was employed as a home care aide by Pella Care, Inc. ("Pella Care") from about September 2015 to November 2022. *Id*. ¶¶ 67, 68. From about September 2015 to April 2016, Ms. Zhuang worked four consecutive 24-hour shifts per week. After that, Ms. Zhuang regularly worked two consecutive 24-hour shifts per week. *Id*. ¶ 70. Throughout her time working for Pella Care, Ms. Zhuang was paid for only 13 out of the 24 hours of her shifts, despite never receiving five hours of continuous, uninterrupted sleep or more than 30 minutes of meal breaks per shift. *Id*. ¶ 73. Ms. Zhuang is estimated to be owed approximately $130,000 in stolen wages, not including liquidated damages and interest. *Id*. ¶ 67.

Mandatory Arbitration

CPC, First Chinese Presbyterian and People Care are among 42 home care employers that have had long-standing collective bargaining agreements with 1199SEIU United Healthcare Workers East ("1199SEIU"). *Id.* ¶ 77. Beginning in late 2015 to early 2016, 1199SEIU entered into memoranda of agreement with these home care employers requiring that all wage and hour complaints, including those concerning violations of the New York Labor Law, go through a mandatory arbitration process. *Id.* ¶ 78. As a result, class action lawsuits that had been initiated by employees of CPC and First Chinese Presbyterian were stayed or adjourned pending resolution of the arbitration process. *Id*. ¶ 79. On January 2, 2019, 1199SEIU expanded the scope of the arbitration to cover the claims of all aides employed by any of the 42 home care agencies with whom it had mandatory arbitration agreements. *Id*. ¶ 81.

On February 25, 2022, the arbitrator issued a class-wide award based on a settlement between 1199SEIU and the home care agencies. *Id*. ¶ 82. Pursuant to the award, each agency was required to contribute $250 per employee into a settlement fund that would then be distributed among more than 120,000 of 1199SEIU's members who were employed as home care aides. *Id*. Aides interested in participating in the award were required without exception to submit a claim form and general release by September 27, 2022. *Id.* ¶ 83. Those who submitted claim forms began receiving checks in April 2023. Huang Aff. Ex. 57, Cao Affidavit. Most aides received less than 1% of what they were owed. VP ¶¶ 86, 125.

Following the lead of 1199SEIU, other unions have also entered into mandatory arbitration agreements with home care employers. *Id*. ¶¶ 87, 90. Local 1770, Home Healthcare Workers of America, IUJAT ("Local 1770") is one such union. *Id*. Local 1770 represents the employees of Pella Care, including Ms. Zhuang. *Id*. ¶ 87. At some date between December 12, 2022 and February 24, 2023, Local 1770 initiated a grievance regarding Ms. Zhuang's New York Labor Law claims. *Id*. ¶ 88.

In contrast to the results of the 1199SEIU arbitration, the NYSDOL has reached outcomes for home care aides who are not members of unions and are not bound by mandatory arbitration agreements that cover all of the wages owed to them plus liquidated damages. *Id.* ¶ 126.

NYSDOL Closes Cases Pursuant to a New Rule

Unable to opt out of the mandatory arbitration process, Petitioners and the putative class members sought the NYSDOL's assistance to vindicate their rights. *Id.* ¶¶ 95-106. Between December 2018 and May 2022, Petitioners filed complaints at the NYSDOL seeking to recover their unpaid wages, overtime, and spread of hours pay. *Id.* ¶¶ 95, 98-99, 105-106. Even though it knew that the grievance and arbitration process covering the claims of 1199SEIU members was

already underway, the NYSDOL nevertheless agreed to investigate these complaints. *Id*. ¶ 96. To maximize efficiency, the NYSDOL adopted a method of auditing the claims of only a representative sample of aides. *Id*. ¶¶ 97, 101-102. Findings for the audit would then be applied across all complainants. *Id.* ¶ 102. This method ensured that the investigations could proceed with minimal resource expenditure by the NYSDOL. And by December 2019, the NYSDOL had found "overwhelmingly corroborative" evidence supporting the aides' allegations of widespread and systematic violation of the 13-hour rule, prompting the NYSDOL to initiate an investigation into the joint-employer liability of the managed long-term care companies that had contracted with the home care agencies to obtain the aides' services and had authorized the aides' schedules and dictated their day-to-day duties. *Id.* ¶¶ 103-104.

Beginning on April 27, 2023, though, the NYSDOL did an abrupt about face. *Id.* ¶ 6. In just a matter of weeks, the NYSDOL closed hundreds of cases initiated by home care aides. *Id*. ¶ 108, 111, 112. Each case shared at least one characteristic: it had been filed by a home care aide who was also a member of a union that had a mandatory arbitration agreement with her employer. *Id*. ¶¶ 91-92, 122. On July 6, 2023, a representative of the NYSDOL confirmed that the agency had instituted a new policy of closing cases filed by home care aides whose unions and employers had entered into mandatory arbitration agreements covering their claims. *Id.* ¶ 114. According to the representative, the new policy was necessitated by the NYSDOL's legal conclusion that the private arbitration agreements between the aides' unions and their employers superseded its power to investigate and enforce the law. *Id*. The NYSDOL also alluded to the rule in an August 1, 2023 press release announcing settlements on behalf of two aides. In the release, the NYSDOL stated, "NYSDOL may accept these types of cases [regarding violations of the 13-hour rule] if an employee is not covered by an arbitration clause…" *Id*. ¶ 115. Prior to

instituting this policy, the NYSDOL did not take any of the formal rulemaking steps required by the New York State Administrative Procedures Act ("SAPA").

In many of the closing letters received by Petitioners and the putative class members, the NYSDOL indicated that the aides had chosen mandatory arbitration as the venue to pursue their claims. *Id.* ¶¶ 109, 123. This is untrue. Ms. Chen, Ms. Li, Ms. Rodriguez, Ms. Song and many of the putative class members deliberately chose to pursue their claims at the NYSDOL because they believed that the agency was their only option for meaningful recourse in light of the paltry payouts available under the 1199SEIU arbitration award. *Id.* ¶¶ 86, 110, 124-125. Ms. Zhuang and other members of the putative class were not even aware that they were members of a union – much less that the union's agreement with their employer obligated them to pursue mandatory arbitration – when they filed their claims at the NYSDOL. *Id.* ¶ 89.

Many of the closing letters also refer to Section 196(2) of the New York Labor Law, which "grants the Commissioner of Labor discretion to investigate or take assignment of wage claims." *Id.* ¶ 127. However, the NYSDOL has never published public standards or regulations governing the exercise of that discretion. Instead, the NYSDOL has an internal document known as the Field Investigator's Manual, which it describes as "a tool to be used as both a reference manual and an instruction guide" for Labor Standards investigators. Huang Aff. Ex. 35, Field Investigator's Manual at Section I. The Field Investigator's Manual is not publicly available. Pursuant to the Field Investigator's Manual, the NYSDOL will decline to exercise jurisdiction over claims involving union members only when the claim requires the NYSDOL to interpret an ambiguous or disputed provision of a collective bargaining agreement. *Id.* Petitioners' and the putative class members' claims did not require any interpretation of their collective bargaining agreements. The Field Investigator's Manual also enumerates the circumstances that justify the

closing of an investigation – namely, once a violation has been issued, a settlement has been reached and payment is received or stipulated, a compliance conference is scheduled, or a referral for an Order to comply is required. *Id*. None of the steps justifying closure had been reached in the investigations of Petitioners' and the putative class members' claims.

ARGUMENT

This Court may annul the NYSDOL's determinations to close its investigations into the Petitioners and the putative class members' claims, or order the NYSDOL to take other appropriate action, upon a finding that the determinations were affected by errors of law or were arbitrary and capricious. CPLR 7803(3), 7806; *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Srvcs.*, 77 N.Y.2d 753, 757-758 (1991). Because the NYSDOL's determinations are final and may not be adequately reviewed by appeal to a court or any other body or officer, review pursuant to Article 78 is proper. CPLR 7801.

I. THE NYSDOL'S DETERMINATIONS TO CLOSE PETITIONERS' INVESTIGATIONS WERE AFFECTED BY ERRORS OF LAW

The NYSDOL's determinations to close investigations into Petitioners' and the putative class members' claims were affected by two errors of law. First, the NYSDOL relied on a rule that was not promulgated in accordance with the requirements of SAPA. Second, the NYSDOL wrongly determined that closure of the investigations was required because the private arbitration agreements between Petitioners' and the putative class members' unions and employers superseded its powers.

A. The NYSDOL Based Its Determinations on an Unlawfully Promulgated Rule.

SAPA defines a rule as "the whole or part of each agency statement, regulation or code of general applicability that implements…the procedure or practice requirements" of the agency.

N.Y. SAPA § 102(2)(a)(i); *Matter of Cordero v. Corbisiero*, 80 N.Y.2d 771, 773 (1992). Excluded from this definition are policies "concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public." N.Y. SAPA § 102(2)(b)(i).

Prior to the adoption of a rule, an agency must "submit a notice of proposed rulemaking to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." N.Y. SAPA § 202(1). An agency's failure to comply with SAPA's rulemaking procedures shall result in the reversal of any determinations based on the improperly promulgated rule and a declaration that the rule is invalid. *Matter of Cordero*, 80 N.Y.2d at 772; *Matter of Schartfigure v. Hartnett*, 83 N.Y.2d 296, 302 (1994).

An agency's policy constitutes a rule, subject to SAPA's requirements, whenever the policy articulates a "fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers." *Matter of New York City Tr. Auth. v. New York State Dept. of Labor*, 88 N.Y.2d 225, 229 (1996) (citing *Matter of Roman Catholic Diocese of Albany v. New York State Dept. of Health*, 66 N.Y.2d 948, 951 (1985); *Matter of Schwartfigure*, 83 N.Y.2d at 301; *Matter of Cordero*, 80 N.Y.2d at 772-773). When a policy establishes a pattern or course of conduct for the future, it will be considered a rule. *Matter of Alca Indus., Inc. v. Delaney*, 92 N.Y.2d 775, 778 (1999) (discussing cases). Ad hoc decision making based on individual facts and circumstances does not rise to the level of a rule, nor do policies that permit case-by-case analysis of the facts or significant discretion and flexibility on the part of agency officials. *Id.* (finding no rule where Office of General Services set withdrawal criteria for one particular contract); *also Matter of*

Teresian House Nursing Home Co. Inc. v. Chassin, 218 A.D.2d 250, 254 (3d Dep't 1996) (no rule where agency's evaluation included individualized review of criteria that were factually specific); *Matter of New York City Tr. Auth.*, 88 N.Y.2d at 229 (no rule where penalty guidelines vested inspectors with significant discretion and allowed for flexibility in the imposition of penalties). However, where a policy has general applicability and "prescribes a procedure or practice requirement of the agency," it will be considered a rule. *Matter of Roman Catholic Diocese of Albany*, 66 N.Y.2d at 951; *also Matter of Cordero*, 80 N.Y.2d at 773 (rule found where policy established a mandatory procedure).

Here, the NYSDOL's policy of closing investigations into claims filed by home care aides whose unions and employers had entered into mandatory arbitration agreements bears all the hallmarks of a rule subject to SAPA's requirements. NYSDOL applied the policy rigidly across all of the complaints filed by Petitioners and the putative class members without any regard to the aides' individual circumstances, the presence of any mitigating factors, or the purpose of the Minimum Wage Act.

Because the NYSDOL's policy to close the investigation of claims filed by Petitioners and the putative class members whose unions and employers have entered into mandatory arbitration agreements constitutes a rule, the NYSDOL was required to comply with the rulemaking procedures of SAPA. Pursuant to SAPA, the NYSDOL needed to submit a notice of proposed rulemaking to the secretary of state for publication in the state register and to afford the public an opportunity to submit comments on the rule prior to its adoption. N.Y. SAPA § 202(1)(a). However, the NYSDOL took none of those steps. This failure to follow the proper rulemaking procedure renders the NYSDOL's rule invalid, unauthorized and subject to annulment. And, because the NYSDOL based its decisions to close Petitioners' and the putative

class members' cases on this unlawfully promulgated rule, reversal of the determinations is required and the NYSDOL's improper rule should be annulled.

B. The Determinations Were Based on an Erroneous Legal Conclusion.

The NYSDOL also based its determinations to close the investigations into Petitioners' and the putative class members' claims on its erroneous legal conclusion that the mandatory arbitration agreements between the aides' unions and employers superseded the NYSDOL's powers.

In 2002, the United States Supreme Court held that an arbitration agreement between an employer and employee does not bar the Equal Employment Opportunity Commission ("EEOC") from seeking victim-specific relief when seeking to enforce the American with Disabilities Act ("ADA"). *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002). In reaching its decision, the Court cited its long-standing view that "the purpose of Congress…was to make arbitration agreements as enforceable as other contracts, but not more so." *Id*. at 294 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967)). Therefore, the general policy favoring arbitration may not be used to justify a result that is inconsistent with the intent of the parties or the plain text of the contract. Because the EEOC was not a party to the parties' arbitration agreement and had not otherwise agreed to arbitrate its claims, "the pro-arbitration policy goals of the FAA do not require the [EEOC] to relinquish its statutory authority if it has not agreed to do so." *Id*. The Court also concluded that the private arbitration agreement could not limit the EEOC's statutory authority to enforce Title VII and the ADA. *Id.* at 288 ("To hold otherwise would undermine the detailed enforcement scheme created by Congress simply to give greater effect to an agreement between private parties that does not even contemplate the EEOC's statutory function.")

The New York Court of Appeals applied *Waffle House* when it decided that the Attorney General was not barred from seeking damages on behalf of life-insurance policy holders who had agreed to arbitrate all claims arising from their policies:

> The Attorney General of New York State has statutory authority to serve the public interest by seeking both injunctive and victim-specific relief, comparable to that of the EEOC in the federal arena…Like the EEOC, the Attorney General should not be limited, in his duty to protect the public interest, by an arbitration agreement he did not join. Such an arrangement between private parties cannot alter the Attorney General's statutory role or the remedies that he is empowered to seek.

People ex rel. Cuomo v. Coventry First LLC, 13 N.Y.3d 108, 114 (2009). And in perhaps the most factually analogous circumstance, a Brooklyn federal court affirmed the unrestricted power of the USDOL to recover back wages and liquidated damages on behalf of subcontractors of Con Edison notwithstanding an agreement between the subcontractors and Con Edison requiring mandatory arbitration of all disputes. *Scalia v. CE Security, LLC*, 21-CV-00057 (AMD)(RLM), 2021 WL 3774189 at *3 (E.D.N.Y. Aug. 25, 2021). Notably, the USDOL has publicly embraced the *Waffle House* holding in announcing its enforcement initiative to prosecute vigorously violations at workplaces where workers are bound by mandatory arbitration agreements. VP ¶¶ 120-121.

Waffle House has also been consistently relied upon in other states to uphold the power of government actors to pursue enforcement actions when they are not parties to private arbitration agreements. *See, e.g., People v. Maplebear, Inc.*, 81 Cal.App.5th 923, 940 (2022) (City of San Diego not precluded by arbitration agreement from enforcing laws against misclassification and seeking restitution); *Rent-A-Ctr., Inc. v. Iowa Civil Rights Comm'n*, 843 N.W.2d 727, 735 (Iowa 2014) (FAA reach does not extend to Commission that was not a party to the arbitration agreement); *State ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 570 (Minn. Ct.

App. 2005) (State's suit covering bank's numerous harms against credit card holders with whom it had arbitration agreements not precluded).

The NYSDOL's conclusion that the private arbitration agreements between the aides' unions and employers supersedes the NYSDOL's enforcement powers and consequent ability to investigate Petitioners' and the putative class members' claims is plainly contrary to established precedent. Petitioners and the members of the class are therefore entitled to reversals of the NYSDOL's determinations to close the investigations into their claims because those determinations were affected by this error of law.

II. THE NYSDOL'S DETERMINATIONS ARE ALSO ARBITRARY AND CAPRICIOUS.

Section 196 of the New York Labor Law sets forth the duties, power, and authority of the Commissioner of Labor "to investigate and attempt to adjust equitably controversies between employers and employees" related to the Minimum Wage Act. N.Y. Lab. Law § 196(1)(a). It also provides that "[n]othing in this section shall be construed as requiring the commissioner in every instance to investigate and attempt to adjust controversies, or to take assignments of wage claims…but he or she shall be deemed vested with discretion in such matters." N.Y. Lab. Law § 196(2). But that discretion is not unfettered.

In this case, the NYSDOL's willy nilly articulation of an ad hoc and erroneous rule seeks to justify an egregious abuse of its discretion. Its determinations to close Petitioners' and class members' cases should be reversed because those determinations are arbitrary and capricious. The NYSDOL agreed that it would investigate the claims of 1199SEIU members notwithstanding the arbitration agreement between their union and employers. It determined that the results of its investigations supported the aides' allegations of wage theft. Nevertheless, the

NYSDOL abruptly and arbitrarily changed its course of action and closed its investigations into Petitioners' and the putative class members claims, despite its statutory directive to enforce the Minimum Wage Act and its knowledge that home care aides, as a workforce, suffer tremendous economic harm as a result of the wage theft that has been allowed to continue, unabated.

A. The Determinations Arbitrarily Deviate from the NYSDOL's Prior Stated Course of Action.

For nearly four decades, the New York Court of Appeals has consistently upheld the rule that "when an agency determines to alter its prior stated course it must set forth its reasons for doing so…Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made." *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 520 (1985). Policies must be adopted "in a coherent and consistent manner with appropriate regard for those previously taken or must explain the reasons for variations among policies." *Matter of Liquidation Union Indem. Ins. Co. of NY*, 92 N.Y.2d 107, 123 (1998) (citing *Field*); *also Leggio v. Devine*, 34 N.Y.3d 448, 461-462 (2020) (applying *Field* to policies developed outside of formal processes that were instead the result of ad hoc decision making over time).

Here, the NYSDOL agreed to investigate Petitioners' and other class members' claims with full knowledge that the aides' unions and employers had entered into mandatory arbitration agreements. VP ¶ 96. It developed and implemented a method of auditing a sample of aides from four different agencies in order to maximize the efficiency of its investigations. *Id*. ¶ 101. In December 2019, the NYSDOL reported that the documents it had received from the audited agencies were "overwhelmingly corroborative" of the aides' allegations of wage theft. *Id*. ¶ 103. The NYSDOL then expanded its investigation into the joint-employer liability of the managed long-term care organizations that had contracted for the aides' labor and continued to pursue that

investigation until at least the end of 2021. *Id*. ¶ 104. Nevertheless, beginning on April 27, 2023, the NYSDOL abruptly changed direction. *Id*. ¶ 6. With no real explanation for its reversal, the NYSDOL abandoned its prior stated course of investigating the aides' claims, it abandoned years of investigative findings, and it summarily closed Petitioners' and the class members' cases.

The NYSDOL's determinations to close its investigations into Petitioners' and the other class members' claims also conflict with the practices outlined in its Field Investigator's Manual. The Field Investigator's Manual provides that the NYSDOL will decline jurisdiction over claims of unionized employees only when the claims require interpretation of an ambiguous or disputed provision of the collective bargaining contract. *Id*. ¶ 130. The Manual also states that "[i]nvestigators will 'close cases' off their own dockets once a violation has been issued, a settlement has been reached and payment is receive or stipulated, a compliance conference is scheduled, or a referral for an Order to comply is required." *Id*. ¶ 132. Here, Petitioners' and the other class members' claims required no interpretation of their collective bargaining agreements, and none of the developments that would trigger closure of their cases had been reached. Despite finding evidence of widespread violations, the NYSDOL nevertheless closed the aides' cases without taking any steps to achieve compliance or restitution. Although the Field Investigator's Manual "is not a collection of rigid rules applicable in every investigation", Huang Aff. Ex. 35, Field Investigator's Manual at Section I, the NYSDOL's departures from the policies and procedures outlined within it required an explanation that was never provided.

The NYSDOL's failures to adequately explain why it suddenly reversed course – in declining to continue its investigations into the aides' claims and closing Petitioners' and the other class members' meritorious cases before any resolution had been reached – necessitate reversal on the law as arbitrary. *See, e.g., Era Steel Const. Corp. v.* Egan, 145 A.D.2d 795, 799-

800 (3d Dep't 1988); *Collins v. Governor's Office of Employee Relations*, 211 A.D.3d 1001 (3d Dep't 1995).

B. The Determinations Have No Rational Relationship to the Evidence Obtained or to the Minimum Wage Act.

Agency action may be overturned as arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. *Wooley v. New York State Dep't of Corr. Servs.*, 15 N.Y.3d 275, 280 (2010) (citing *Matter Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009)); *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty.*, 34 N.Y.2d 222, 231 (1974). If there is no rational basis for the decision, an agency's determination will be found arbitrary and capricious. *Matter of Gilman v. New York State Div. of Housing and Cmty. Renewal*, 99 N.Y.2d 144, 149 (2002) (citing *Matter of Nehorayoff v. Mills*, 95 N.Y.2d 671, 675 (2001)).

In December 2019, the NYSDOL determined that the evidence overwhelmingly corroborated Petitioners' and the other class members' allegations that they had been compensated at rates that fell below the statutory minimum wage and had been regularly robbed of their overtime wages. VP ¶ 103. Though a parallel process for resolution of the aides' claims was available in their unions' arbitrations with their employers, Petitioners and the other class members each opted to pursue relief through the NYSDOL, giving up the opportunity to participate in their union's negotiated settlement. *Id*. ¶¶ 84, 124. As a result, no Petitioner or other class members has received any restitution for their years of wage theft. And the violations have continued unabated. *Id*. ¶¶ 49-52, 167. In light of these circumstances, the NYSDOL's decision to close Petitioners' and the class members' cases has no rational basis in the facts.

The NYSDOL's determination to close the aides' cases also has no rational basis in the NYSDOL's role to protect the public interest and enforce the New York Labor Law. Petitioners

and other class members worked full-time schedules that frequently stretched to 72 or 96 consecutive hours per week. *Id*. ¶¶ 37, 46-47, 53, 55, 63, 67, 70. Yet many still struggled to meet their basic needs and lived in poverty. Home care aides as an occupational class overwhelmingly rely on public assistance because the wages they receive are so low. *Id*. ¶ 29. And employers show no sign of reforming their practices: violations of the 13-hour rule continue unabated. *Id*. ¶ 49-52, 167. Given that the working conditions of home care aides are precisely what the Legislature sought to end when it enacted the Minimum Wage Act to eliminate the occupation of persons at wages insufficient to provide adequate maintenance for themselves and their families, N.Y. Lab. Law § 650, the NYSDOL's abandonment of Petitioners' and the other class members' claims has no sound basis in reason.

None of the Petitioners and putative class members who are members of 1199SEIU had recourse beyond the NYSDOL to recover the years' worth of wages stolen from them. VP ¶¶ 77-86, 110. Not only did 1199SEIU's mandatory arbitration agreement with their employers require arbitration of rights under the collective bargaining agreements, it also required mandatory arbitration of statutory claims arising under the New York Labor Law. *Id*. ¶ 78, 110. Aides were therefore precluded from enforcing their rights through private litigation. *Id.* ¶¶ 78-79, 110. The union's deadline to participate in the arbitration award had already passed by the time the investigations were closed. *Id.* ¶ 83. Moreover, no Petitioner or putative class member covered by 1199SEIU's arbitration agreement had actually submitted a claim form to participate in the award distribution. *Id.* ¶ 84. Even if she had, the award distribution resulted in less than pennies on the dollar. *Id*. ¶¶ 86, 125. Aides who were owed tens, sometimes hundreds, of thousands of dollars in unpaid wages, overtime, and spread of hours pay received only hundreds of dollars. *Id*. For example, He Ping Zhou, who is not a member of the proposed class, participated in the

1199SEIU distribution. *Id.* ¶ 86. Petitioners estimate that Ms. Zhou is owed more than $82,000, not including liquidated damages and interest, for working two consecutive 24-hour shifts for about two years. *Id.* Ms. Zhou received an award payment of just $619.42, of which only $360.76 was for wages. *Id.*

As can be expected, these paltry payouts have had no effect in deterring continued violations of the law. Violations of the 13-hour rule persisted throughout the time Petitioners were employed, and, in the case of Ms. Li who still works 24-hour shifts for People Care, continues to this day. *Id.* ¶ 50-52, 167. Had the NYSDOL considered the intransigence of these employers, especially in relation to its role in fulfilling the state's policy of eliminating as rapidly as practicable employment at wages insufficient to provide adequate maintenance for workers and their families, the NYSDOL would not have closed its investigation into these cases. Instead, the NYSDOL's ad hoc policy and decision to close these cases signals an indefensible unwillingness to address ongoing or future violations that have not been stopped by an arbitration.

In addition, questions regarding joint-employer liability – whether the managed long-term care companies that contracted with the agencies for the aides' labor, determined their schedules, and dictated their daily tasks should also be responsible for paying the aides' unpaid wages, overtime, and spread of hours pay – also remain unaddressed. Those managed long-term care companies are not parties to the collective bargaining agreements between the agencies and unions that the NYSDOL is now invoking to justify closing these cases.

Because the NYSDOL's decision to close the investigations into Petitioners' and the other class members' claims has no rational relationship to either the evidence obtained or to the

NYSDOL's directive to enforce the Minimum Wage Age, the determinations are arbitrary and capricious and an abuse of discretion and should be vacated.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their Petition and direct Respondent to re-open and fully investigate the complaints filed by Petitioners and the other class members.

Dated: September 8, 2023
New York, New York

NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE

/s/ *Carmela Huang*
Carmela Huang
Claudia Wilner
50 Broadway, 15th Floor
New York, NY 10004-3821
(646) 393-3048
huang@nclej.org
wilner@nclej.org

THE LEGAL AID SOCIETY
Elizabeth Saylor, of counsel
Richard Blum, of counsel
Michael Diller, of counsel
49 Thomas Street, 5th Floor
New York, NY 10013
(332) 400-7956
esaylor@legal-aid.org
rblum@legal-aid.org
mdiller@legal-aid.org
Counsel for Petitioners and the Putative Class

WORD COUNT CERTIFICATION

I, Carmela Huang, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in 22 NYCRR § 202.8-b because it contains 6,113 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Dated: September 8, 2023
New York, New York

/s/ *Carmela Huang*
Carmela Huang