Home Health Care and the FLSA:
A Need-to-Know Guide for Reducing the Risk of Class Action Litigation

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November 1, 2013
NAHC 2013 Annual Meeting & Exposition
Gaylord National Resort & Convention Center
Washington, DC

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WAGE AND HOUR LITIGATION
TRENDS AND STATISTICS

Recent Trends
Wage & Hour Class/Collective Actions

- 91% of employment class actions = wage & hour claims
- $467 million in total wage and hour settlements in 2012
- $4.8 million = average wage & hour case settlement in 2012.

* Data from “Trends in Wage and Hour Settlements: 2012 Update.” NERA Economic Consulting (March 2013)
FLSA Collective Actions
– How Do they Work?

• Under the FLSA employees can bring an action “collectively” on behalf of themselves and other similarly situated employees.
• Rule 23 of the Federal Rules governs all other class actions in federal court.
• Differences – Under FLSA
  – Individuals must “opt-in”
  – Courts generally apply two-step procedure for class certification

The Problem -
The Lenient “Conditional Certification” Standard

• The first step – notice, often called “conditional certification”
• Plaintiffs must show putative class members “similarly situated”
• In contrast to R. 23 under Dukes, courts typically apply a lenient standard
• Common policy or practice and a handful of affidavits may be enough
• If conditional certification granted, plaintiffs’ counsel sends notice telling potential class members they may “opt-in” to the lawsuit
The Problem

• Healthcare Employers’ Wage and Hour Practices Are Under Attack

Healthcare Industry is a Major Target

• In 2011 and 2012, more than 690 wage and hour lawsuits were filed against healthcare organizations
• Wage and hour class/collective actions against healthcare organizations increased by almost 10% from 2011 to 2012, and have even more significantly increased since 2008.
• Home care employers specifically are being targeted:
  • Gentiva Health Services, Inc.
  • Amedisys, Inc.
  • Maxim Healthcare Services
  • Resurrection Home Health Services
  • At Home Neighborly Nurse
  • Bienvenidos Home Health Care LLC
  • Nurse On Call, Inc.
  • Consolidated Home Health
  • Pyramid Home Health Services
  • Res-Care, Inc.
  • Care Response Home Health Agency Corp.
  • CareStar, Inc.
  • LifeCare Home Nursing, LLC
  • Friends Health Care Services, Inc.
  • Ann’s Choice, Inc.
  • AccentCare
  • Caring People Inc.
  • Epic Health Services
Healthcare Class Actions Are All Over the Map

Wage Hour Class/Collective Action Complaints Against Healthcare Organizations

Fight on Two Fronts

The New DOL—Enforcement and Legislative Initiatives
U.S. Department of Labor

- David Weil was recently nominated to serve as Administrator of the DOL's Wage and Hour Division.

- In 2010, Weil published a report for the DOL titled: "Improving Workplace Conditions Through Strategic Enforcement".

- Report provides insight on Weil's priorities as well as his approach to enforcement.
  - Focuses on "fissured" industries "known for employing vulnerable workers".

DOL Enforcement: Targeting Home Health Care Employers

- "Fissured employment relationships": large businesses contracting, outsourcing and subcontracting "employees" from smaller businesses.

- Results in highly competitive markets with interest of keeping costs (including employee wages) down.

- Home Health Care specifically referenced as a "priority industry" that should be a “focus of WHD attention over the next few years.”:

<table>
<thead>
<tr>
<th>Hotel/Motel</th>
<th>Residential Construction</th>
<th>Janitorial Services</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moving Companies/Logistics</td>
<td>Home Health Care</td>
<td>Landscaping</td>
</tr>
<tr>
<td>Health Care</td>
<td>Agricultural Products</td>
<td>Grocery &amp; Retail</td>
</tr>
</tbody>
</table>
Legislation: Elimination of the Companionship Exemption for Home Care Employees

- On September 17, 2013, the DOL's Wage and Hour Division announced a final rule eliminating the FLSA minimum wage and overtime exemption for home care workers employed by home care agencies and other companies.
- Effective January 1, 2015, agencies must pay home care workers overtime at one-and-a-half times their regular rate of pay for all hours worked over 40.

Industry Impact of Elimination of Companionship Exemption

- Findings of survey* conducted for home care agencies to determine the potential impacts of the DOL’s proposal to modify the companionship services exemption (and live-in exemption):
  - Moderate to significant increases in business costs have occurred or would occur under the proposed rule.
  - Agencies consistently referenced restricting or expecting to restrict overtime hours for employees that provide companionship services throughout the survey. Some employers also suggested the need to reduce benefits, etc.
  - Quality of care impact is reported by all respondents including loss of service continuity, weakened staff competencies, and a shift of clients to unregulated gray market caregivers.
  - Costs would be passed on to elderly, infirm and special needs clients/patients in private pay care.
  - Current reimbursement for services covered by federal and state programs does not cover overtime.

*Companionship Services Exemption Survey, conducted by the Private Duty Homecare Association, an affiliate of the National Associations for Home Care & Hospice and the National Private Duty Association. 1,428 home care agencies participated in the survey.
Industry Impact of Elimination of Companionship Exemption

- Agency estimates of the impact of overtime pay on business costs:

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>Significant Increase in costs</th>
<th>Moderate Increase in costs</th>
<th>Minimal Increase in costs</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not pay overtime*</td>
<td>76.3%</td>
<td>17.3%</td>
<td>2.9%</td>
<td>96.5%</td>
</tr>
<tr>
<td>Required to pay overtime</td>
<td>40.0%</td>
<td>27.8%</td>
<td>24.2%</td>
<td>92.0%</td>
</tr>
<tr>
<td>Voluntarily pay overtime</td>
<td>34.0%</td>
<td>34.9%</td>
<td>24.1%</td>
<td>93.0%</td>
</tr>
</tbody>
</table>

*Agencies that do not provide overtime pay were asked about expected impact on business costs. Agencies that pay overtime wages were asked about the actual impact.

Industry Impact of Elimination of Companionship Exemption

- Employed caregivers will have working hours restricted to control overtime costs:

<table>
<thead>
<tr>
<th>Agency Type</th>
<th>Restrict OT Hours</th>
<th>Assign More Employers Per Client/Patient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not pay overtime*</td>
<td>86.2%</td>
<td>77.9%</td>
</tr>
<tr>
<td>Required to pay overtime</td>
<td>62.6%</td>
<td>62.1%</td>
</tr>
<tr>
<td>Voluntarily pay overtime</td>
<td>60%</td>
<td>58.7%</td>
</tr>
</tbody>
</table>

*Agencies that do not provide overtime pay were asked about expected business adjustments. Agencies that pay overtime wages were asked about their actual business adjustments.
Legislation: Double Trouble with the Affordable Care Act

• Beginning January 1, 2015, employers with 50 or more full-time-equivalent employees provide health care coverage to their full-time employees (those working on average 30 or more hours per week), or pay steep penalties.

• EFFECT: In 2015, not only will employers have to pay overtime to full-time home care employees but qualifying employers also will be required to pay health care coverage.

Considerations & Planning for Reclassifying Employees from Exempt to Non-Exempt Status

• Review current compensation structures
  – Consider pay restructuring: piece rate or salary under fluctuating workweek method
  – Consider workforce restructuring: hire additional workers, hire more part-time workers
• Implement new timekeeping systems
• Reprogram payroll systems
• Adopt new pay policies
• Train the newly non-exempt employees and their managers on the new policies and procedures
WHAT ARE THE POTENTIAL COSTS ONCE A CLAIM IS FILED?: EXPOSURE MODEL AND RECENT SETTLEMENTS

The BIG Question: How Much Will It Cost If We Lose?

• Two types of exposure:
  – Historical exposure
  – Continuing exposure

• How long?
  – FLSA has a two year statute of limitations, but the limitations may be extended to three years if the violation is considered “willful”
Data on Settlements

- Publicly-reported data on W&H class and collective action final settlements*
- **2009:**
  - Median: $2,500,000
  - Average: $8,900,000
- **2010:**
  - Median: $1,600,000
  - Average: $5,900,000
- **2011:**
  - Median: $1,600,000
  - Average: $4,600,000
- **2012:**
  - Median: $1,700,000
  - Average: $4,800,000

*Data from "Trends in Wage and Hour Settlements: 2012 Update." NERA Economic Consulting (March 2013)

Settlements of Wage-Hour Cases against Healthcare Providers

- $85 million to settle claims that 23,000 nurses and other 12-hour-shift employees were denied extra pay after a change in California law entitled them to overtime ($3,696 avg. per employee)
- $15 million to settle claims that nurses, social workers and aides were denied overtime and rest and meal periods.
- $7.7 million to settlement claims that healthcare workers were denied pay when pay was auto-deducted for meal periods that were not taken or were interrupted.
- $2 million to settle claims that 3,000 home health care workers were not paid for time spent (or expenses) when traveling between patient visits, including overtime.
- $1.7 million in back wages to nurses for work done during unpaid meal breaks to settle DOL lawsuit.
Strike Zones: Off-The-Clock Work

- Remote use of electronic devices
- Missed/interrupted meal and rest periods
- Travel time
- Waiting/On-call time
- Timekeeping rules: rounding, auto-deductions, regular rate
- Training time
- Volunteer activities
- Non-exempts paid on piece rate
Strike Zones: Exemptions

- Professional Exemption
  - Advanced knowledge in specialized field (e.g., LPNs v. RNs)
  - Paid salary or fee
- Administrative Exemption
  - Discretion and Independence
  - Paid salary or fee
- Executive Exemption
  - Two or more FTEs
  - Paid salary
- Elimination of Companionship Services Exemption

Strike Zones: Exemptions (cont.)

- Duties and Compensation Tests
  - Non-exempt activities must be limited
  - Fee-based employees’ fees must be for “unique” activities
  - Salaried employees must be guaranteed at least $455 per week
- Pay per visit v. salary-plus compensation plans
- State laws vary (e.g., RNs may not be classified as exempt professionals under CA law)
- Employees should keep accurate records of all time worked
### Reclassifying Employees from Exempt to Non-exempt Status

- Plan your timeline to include enough time to:
  - determine whether adjustments should/need to be made to compensation methods
  - allow payroll to make any programming changes
  - allow training of employees on time keeping policies and messaging of communications
  - allow for state required notice

### Reclassification: Key is Communication

- Develop change management process around communications with business leadership, managers & employees
- Develop consistent messaging for change that is tied to proactive compliance based on recent changes in the law
Reclassification: Legal Considerations

- Determine whether back pay will be paid.
- If back pay will not be paid – as is the case with reclassifying home care companions – consider developing message to employees that clarifies that change is being made on proactive basis, rather than due to a past noncompliance issue.
An Effective Compliance Program for Non-exempt Employees

- Wage and Hour Policies
- Eliminate Assumptions
- Complaint and Investigation Procedures
- Training
- Audits
- Exemptions: Developing Evidentiary Support

An Effective Set of Policies

- Policies must address all areas of potential wage and hour compliance concerns
- Policies must be well-publicized and easy to locate
- All employees should review policies on a regular basis and acknowledge receipt of same
- All employees should be trained on key policies
Important Policies for Home Care Employees

- Explaining Overtime Eligibility
- No off-the-clock work
  - Pre- and Post-Shift Work
- Explaining Meal and Rest Periods
- Travel, including addressing “continuous workday” issues (e.g., calling patients before leaving home)
- Record all working time
- For employees paid per visit:
  - Ensure policies explain that all visit-related activities are compensated via the visit rates
  - Consider advantages of transitioning to salary-plus compensation system

Certification of Time Records

- Require non-exempt employees to review time records.
- Daily review is ideal but something less frequent can be used provided employees have the opportunity to review actual records.
- Provided records are correct, require employee certification as to accuracy.
- If records are not correct, require employee to identify any inaccuracies to permit immediate correction.
- Require employees to review accuracy of paycheck and, if systems permit, certify secondary review. On-line tools make this level of review more available.
- Certification should cover off-the-clock work and meal periods.
Implement a Complaint Mechanism

- An effective and confidential complaint mechanism allows the employer to uncover and correct issues before litigation.
- Give employees a choice:
  - Ethics or compliance hotline (1-800 #)
  - Designated HR professional
  - A senior manager
- Revise existing complaint mechanism to ensure it specifically addresses wage and hour issues.
- **Must be well publicized:** Publicize complaint mechanism in handbooks, open door policies, collective bargaining agreements, ethics handbooks, and other employee communication channels.

Follow Through: Investigate & Resolve

- Your organization must **follow through on complaints**
  - Written investigation procedures
  - Assign accountability so issues do not fall through the cracks
- Ensure confidentiality where possible
- Investigate promptly and thoroughly
- Provide closure to complaining employee
- Fix problems promptly
Impose Appropriate Discipline for Policy Violations by Employees and Managers

- In some reported cases, employers have been criticized for quickly disciplining employees for timekeeping violations but not doing so for manager violations.
- Manager misconduct is increasingly being characterized as wage theft.
- Manager misconduct should be promptly addressed and, where confirmed, considered serious violation of the company's most important policies.

Train, Train, Train

- Most employees and managers don't know the basic rules or understand why they are important.
  - Rules are complex
  - Laws not common sense
  - Often ideas that seem great can violate policy or the law
- The best policies are useless if employees don’t understand them and you don’t enforce them.
How Training Helps Defeat Off-the-Clock Work Claims

- Prevent inadvertent federal and state law violations.
- Prevent claims:
  - Policies are clear and irrefutable.
  - Plaintiff credibility?
  - More difficult to certify a class.
- Reduce damage awards and potentially build a **good faith defense**.
- Build a culture of compliance.

Who Should Be Trained

- **Training should be targeted to suit the needs of different employee audiences**
  - Managers
  - Employees (non-exempt)
  - Payroll/compensation specialists
- **Employee training should focus on the basics, such as:**
  - What is working time/what is not
  - Rules relating to overtime
  - Prohibition against off-clock work
  - How do I report errors and misconduct?
Periodic Reminders

- Timekeeping policies and procedures should be reinforced through available communication means
- Annual letter to all employees
- Newsletters
- Postings
- Refresher trainings

Compliance Areas to Audit

- Exempt classifications
- Off-the-Clock
- Regular rate calculations and other pay practice issues (including state law)
Before Starting an Audit

- Goals and Scope
- Audit Protocol
- Privilege Issues
- Remedial Measures
  - Your company must be prepared to fix uncovered errors

Exemption Audit: Best Practices

- Review Documents
- Interview SME Managers
- Interview Incumbent Employees
- Reach Consensus on Job Duties
- Prepare Legal Memos on Exempt Jobs
- Implement Remedial Measures
Controlling Your Risk

• Keep job descriptions up to date, and have employees confirm accuracy during performance appraisal
  – Ex) Self-evaluations and job descriptions focusing on unique duties/discretion
• Include explanation of compensation in offer letter (e.g., if pay per visit, explain visit rate/any additional pay)
• Centralized review of new and changed jobs by HR/Legal
• Periodic training for HR/Legal

Questions?
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