Legal Update: Navigating Recent Wage & Hour
Developments in the Home Care Industry
and Strategies for Compliance

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Recent Trends in Wage & Hour Class/Collective Actions

- $215 million in total wage and hour settlements in first three quarters of 2013
- $4.5 million = average wage and hour case settlement in 2013

*Data from “Trends in Wage and Hour Settlements 2013 Update.” NERA Economic Consulting (November 20, 2013)
### Notable Class Action Settlements in 2013

- 4,490 correctional officers in Puerto Rico awarded $35 million in claims alleging denial of overtime.
- About 9,000 current and former employees of fitness company awarded $17.5 million in a decertified overtime collective action.
- Class complaint by technicians alleging minimum wage and overtime violations, and improper deductions settled for $14.3 million.
- About 1,100 escrow officers, escrow assistants and similar positions awarded $12 million; claims alleging an array of wage and hour law violations, including denial of overtime, off-the-clock work and meal and rest break violations.
- Meal break action brought by approximately 700 refinery workers settled for $11.6 million.

*Data from “Trends in Wage and Hour Settlements 2013 Update.” NERA Economic Consulting (November 20, 2013)*

### Trends by Allegation

- Allegations of overtime violations dominate; approximately 45% of the allegations raised in wage and hour cases settled between January and September 2013 were related to an overtime violation.
- Missed meals and breaks = 19%
- Misclassification allegations = 15%
- Other Off-the-clock work = 12%
- In 2013, donning and doffing, minimum wage, and tip pooling allegations continued to represent 5 percent or less of wage and hour cases settled

*Data from “Trends in Wage and Hour Settlements 2013 Update.” NERA Economic Consulting (November 20, 2013)*
Healthcare Industry Being Targeted

- In 2012 and 2013, approximately 632 wage and hour lawsuits were filed against healthcare organizations.
- Wage and hour class/collective actions filed against healthcare organizations have significantly increased since 2008.
- In 2013, approximately 10% of all wage and hour cases filed were in the healthcare industry.
- Average healthcare wage and hour settlement in 2013: approximately $4 million.

Healthcare Class Actions Are All Over the Map

![Map showing states with highest number of wage hour class/collective action complaints against healthcare organizations.]

- Highest # of lawsuits
- Second-Highest # of lawsuits
- Other States where lawsuits have been filed.
LEGAL UPDATE

RECENT DEVELOPMENTS IN THE LAW AFFECTING HEALTHCARE EMPLOYERS

Legislation Banning Mandatory Nurse Overtime

- State laws prohibiting mandatory overtime for nursing
- Maximum shift lengths
- Reporting requirements
- As of 2012, at least 18 states have regulations restricting mandatory overtime hours for nurses: Alaska, California, Connecticut, Illinois, Maine, Massachusetts, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Washington, and West Virginia
  - E.g., New Jersey law sets a maximum 40-hour workweek in hospitals and nursing homes for all health professionals who deliver care
President Obama’s Directive for DOL to Change Exemptions

- March 13, 2014, President Obama signed memorandum instructing the Secretary of Labor to update the DOL’s regulations regarding who qualifies for overtime protection
- Particular focus on the minimum salary level and duties test of the executive exemption
- Proposed rule likely to be published in November 2014

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<tr>
<th>Increases to Minimum Wage for Federal Contractors</th>
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<td>• February 12, 2014, President Obama signed an Executive Order raising the hourly minimum wage for federal contractors to $10.10 per hour starting January 1, 2015</td>
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<td>- Covers federal contracts and contract-like instruments that are the result of solicitations issued on or after January 1, 2015</td>
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<td>• Expect DOL to issue a Final Rule in October 2014</td>
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<td>• In response, several companies have elected to voluntarily increase minimum wage for their hourly workers, such as IKEA, Gap (including Old Navy, Banana Republic), Costco, Whole Foods, In-N-Out Burger</td>
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<td>• States also raising minimum wages; as of August 2014, 13 states have raised their own minimum wages</td>
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### Fair Pay and Safe Workplaces Executive Order

- Signed by President Obama on July 31, 2014
- Also targets federal contractors
- Involves:
  - Required reporting of labor law violations by contractors
  - Similar requirements from subcontractors
  - Pay notices
  - Banning mandatory arbitration of civil rights, sexual discrimination and harassment violations against workers under contracts worth at least $1 million

### What Should Employers Do Now?

- Continue to monitor these expected changes in labor and employment law landscape.
- Conduct a risk assessment to evaluate the potential affect of these Executive Orders on employment practices and federal contracts.
Overview of Relevant 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 full-time employees
  – Paid salary

• Companionship Exemption
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**

Recent Challenges to Pay-Per-Visit Compensation Plans

- Plaintiffs’ attorneys have filed lawsuits against two of the country’s largest home health care companies (Gentiva Health Services, Inc. and Amedisys, Inc.), alleging, among other things, that registered nurses, occupational therapists, physical therapists and similar positions were improperly classified as exempt employees under the FLSA and denied overtime.

- Lawsuits allege that the clinicians were improperly paid on a per-visit basis for patient visits and compensated for additional non-visit activities based on time worked.
### Elimination of the Companionship Exemption

- September 17, 2013, the DOL’s Wage and Hour Division announced a final rule eliminating the FLSA “companionship services” 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.

### Elimination of the Companionship Exemption

- Major changes of the DOL’s final rule include:
  - Changes to the definition of “companionship services” by removing “care” from the definition.
  - Impact on live-in domestic service employees.
  - Impact on third party employers.
Yours, Mine, Or Ours?
Joint Employer Issues

- Under the FLSA, more than one entity may be an employee’s legal “employer”
- Greater control = greater likelihood of joint employment finding
- Joint employers must aggregate hours worked by an employee at different employment sites when calculating overtime compensation due
- Standing arguments
- Impact on franchise-franchisee relationship in healthcare industry

A Target on Non-Exempt Pay Practices

- Meal periods
- Rounding
- Failure to include premiums and differentials in regular rate
- Remote work
- Failure to pay overtime for piece-rate or day rate workers
- Volunteer and training time
- Employees misclassified as independent contractors
- Travel time
LEGAL UPDATE

DEVELOPING AN EFFECTIVE
WAGE AND HOUR LIABILITY
PREVENTION AND
COMPLIANCE PLAN

An Effective Compliance Program for Non-Exempt Employees

- Wage and Hour Policies
- Eliminate Assumptions
- Complaint and Investigation Procedures
- Training
- Exemption Audits
Adopting Effective Pay and Timekeeping Policies

- If home care employees are paid per-visit, explain in the policy how the per-visit compensation plan works, including identifying what work is compensated by the per-visit rate versus administrative or other non-visit time
  - Basis for showing agreement for piece-rate compensation
- Add language to timekeeping policy indicating that employees are required to record all work time
  - For example, “You are expected to accurately record all of your work time, including all time spent on visit-related activities and administrative activities.”
  - Defining specifically what constitutes “off-the-clock” work in the timekeeping policy

Adopting Effective Pay and Timekeeping Policies (cont.)

- Overtime policy explaining overtime rate and calculation of regular rate for non-exempt employees
  - Include language explaining that non-exempt employees are eligible for overtime compensation
  - Require all anticipated overtime work to be approved in advance
  - Indicate that employees who work unauthorized overtime will still be paid for all overtime
  - Provide for discipline up to and including termination of employment if overtime work was not pre-authorized
- Sample policy language: “As a non-exempt employee, you are eligible for overtime compensation for time worked over 40 hours in a workweek. All anticipated overtime work should be approved in advance. You will be paid for all time worked, including all overtime worked, you but may be subject to discipline up to and including termination of employment if the overtime work was not pre-authorized.”
- Include language in policy regarding meal and rest periods
Considerations in 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, including timecard certification
- Reprogram payroll systems

Litigation Armoring

- What is it?
  - A strategic planning process guided by lawyers;
  - Protected by the attorney-client privilege; and
  - Used by employers to:
    - Identify future litigation risks;
    - Conduct a “Day One” assessment of the strength of a company’s defenses to likely litigation;
    - Develop and amplify the evidentiary support for litigation defenses; and
    - Mitigate risk through corrective measures.
### Exemption Audits & Littler Xmpt

**New Littler Service Offering**
- Fortifies internal record-keeping policies
- Builds a strong evidentiary record to defend against misclassification claims both prior to and during litigation
- Strengthens good faith defenses under FLSA

**Littler Xmpt (cont.)**

Through client collaboration, Littler Xmpt is implemented by:
- Analyzing client’s current state
- Educating client on areas of risk
- Building evidentiary record around a position
- Training HR & Compensation teams on the process
Use of Arbitration Agreements with Class Action Waivers

- *AT&T Mobility v. Concepcion*: April 2011, U.S. Supreme Court held that class action waivers in arbitration agreements are enforceable
- Companies have responded by revising employment contracts to add mandatory arbitration clauses that preclude class representation
- Pros and cons of arbitration
- Practical steps for employers in implementing mandatory arbitration program

Questions?
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