The New Home Care Challenges and How to Solve Them

Pat Drea, COO
NAHC Leadership Meeting Oct 2015

Disclaimer

The materials and opinions presented represent the speaker’s views, are for educational and informational purposes only, and are not intended to be legal advice and should not be used for legal guidance or to resolve specific legal problems.

This material is regarding federal laws only. Legal advice applicable to your organization’s own state laws and licensure should be sought through your attorney.
Overview

What you should know

- Companionship Exemption Vacated & Live In Changes
- White Collar Exemption Changes
- Misclassification of Workers
- FMLA
- Audits

COMPANIONSHIP EXEMPTION VACATED & LIVE IN CHANGES
Companionship Exemption Lawsuit

*Home Care Association of America, et al. v. Weil, U.S. District Court for the District of Columbia*

- Home Care Association of America
- International Franchise Association
- National Association for Home Care & Hospice

**Status**
- Appeals in process
- Will likely to take a year or more

**Plaintiffs**

**Resolution**

---

**Situation Now**

**Companionship Services Exemption**
- Home care agencies can use the Companionship Services Exemption the same as in the past*—with some associated risk.
  * refer to your state law for changes

**Live-In Domestic Service Exemption**
- Home care agencies may use the live-in domestic service exemption, *but with great care and caution!* Seek wage and hour legal advice before implementing.
- Some states have been addressing live in – seek legal counsel in understanding changes.
What You Should Do

- **Understand** fully definition of Companionship Exemption
- **Implement** documentation of the hours devoted to care vs housework using the definition – CG should document daily
- **Expect** the DOL to enforce at a higher standard than in the past.

———

What do I do Now CE

1. **Update your forms**
   - Recommend that you have new forms
   - **Live In and Overnight Services Pay Practices**
   - **Companionship Exemption Services**
   - **Live in Services – Pay Practices for Sleep Time**
   - **Client Services Agreement**
   - **Agreement Concerning Sleeping Time for 24 Hour Assignments/Live-ins**
   - **Homemaker/Companion Job Description (CE)**
   - **Home Care Aide/Caregiver Job Description (CE)**

2. **Stay tune for Appeals Process!**
Department of Labor

OVERTIME EXPANSION – WHITE COLLAR EXEMPTION

Why the change?

March 13, 2014 presidential Memorandum – Updating and modernizing Overtime Regulations
- Update, Modernize, simplify
- 29C.F.R Part 541 has been amended many times
- Last revised in 2004
- NPRM announced 6/30/15
- NPRM published 7/6/15
- Comments due 9/4/15
- New rules will be published? Early 2016
- New rules will go into effect? Jan 2017
Proposed regulation

- Updates the amount of salary to qualify for the exemption
- Automatically updates the amount of salary required for exemption on an annual basis
- DOL is considering revisions to the duties test

Proposed Changes

White Collar Exemptions

<table>
<thead>
<tr>
<th>Increase in Base Pay for 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Automatically updated each year based on % or CPI-U</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>The $455 per week base pay will be</th>
<th>NPRM base pay increase to $970 wk or $50,440 yr</th>
</tr>
</thead>
</table>
Executive Exemption

- Must meet the new adjusted dollar test - $50,440
- Primary Duty - Management of the employer or recognized department or subdivision
- Supervision – direct the work of 2 or more employees
- Authority to hire and fire

Administrative Exemption

- Must meet the new adjusted dollar test - $50,440
- Primary Duty – Performance of office or non-manual work related to management or general business Operations of the employer
- Discretion and independent judgment with respect to matters of significance.
### Professional Exemption
- Must meet the new adjusted dollar test - $50,440
- Primary Duty – performance of work requiring knowledge of an advance type in a field of science or learning – registered nurse (not LPN or LVN)

### Outside Salesperson
- Primary Duty – making sales or obtaining orders or contracts for which consideration will be paid by customer
- Must take place away from Employers place of business. Suggest that the person does not have an desk or office at the company’s place of business. DOL distinguishes the true outside sales person from call center position.
Highly Compensated Workers

Proposed rules Increase in wage under category of highly compensated workers

From $100,000 To $122, 148

Highly Compensated Employee Exemption

- Employee’s Annual Compensation in 2016 must be $122,148

DOL requesting input on including commissions, nondiscretionary bonuses and nondiscretionary compensation in annual compensation but has stated they commissions and bonuses must be issued on a monthly basis
Employers will have to make hard choices

- Pay employees more?
- Pay them less and/or reduce hours to minimize OT
- Eliminate or reduce benefits to previously exempt employees
- Hire more workers to cover the shortfall and avoid OT
- Hire more part-time office workers
- Increase bill rates to consumers to cover increases

6 Steps to Prepare (1-3)

*Proposed regulations may be costly/disruptive to your business*

1. Identify salaried/exempt employees.

2. Determine if your current job descriptions clearly state the exemption in straightforward language.

3. Consider which positions are in the gray zone
   - Engage an attorney - grey zone
   - Engage an Employer Consultant
6 Steps to Prepare (4-5)

4. **Identify** possible strategies to respond to changes
5. **Create** a financial plan

6. **Shore Up Policies To Reduce OT**
   - Taking work home.
   - Restrict work related mobile device use for non exempt workers
   - Making/receiving job-related phone calls at home.
   - Working through lunch.
   - Working before or after regular shifts.
   - Taking care of employer equipment.
   - Job-related “volunteer” work.
Reducing OT

- Consider how you will handle on call responsibilities taking into consideration overtime considerations.

Electronic Devices & after hours work

- The DOL will publish a Request for Information (RFI) in the near future seeking information from stakeholders on the use of electronic devices by overtime-protected employees outside of scheduled work hours.
- The Department anticipates issuing the RFI in August 2015.
White Collar Exemption Strategies

1. Decide options:
   - Convert from salary to hourly pay
   - Pay salary plus overtime
   - Adjust schedules to hold staff to 40 hours and no OT
   - To meet the new base salary requirement, offer an outsized raise
     (if the $455/wk is raised to $970/wk, raise is $27,840)

2. Create a financial plan to project cost of salary increases if salaried exempt positions must be hourly. Add in increase in salary, overtime, on call, etc.

3. Create a financial worst case scenario.

Resources

Comments to the DOL
DOL encourages all interested parties to participate in the rulemaking process by submitting written comments regarding the NPRM through the online portal provided at www.regulations.gov.

The proposed regulation
80 Fed Reg 38515
http://www.gpo.gov/fdsys
www.regulations.gov under Rule Identification Number (RIN) 1235-AA11
Department of Labor

MISCLASSIFICATION OF WORKERS

Contract Workers

In the past, Contract workers have been used to address workforce needs:
- Nurses
- Marketing
- On Call
- Bookkeepers
- HR, Recruiters, Trainers
- Caregivers (registries) – not the focus of this presentation

Important!
DOL has placed a priority on misclassification of workers.
DOL Clarification

The Wage and Hour Division (WHD) of the U.S. Department of Labor on 7.15.15 issued:

- **Administrator’s Interpretation 2015-1**: The Application of the Fair Labor Standards Act’s “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors.

Administrator’s Interpretation

Narrows the definition of the Independent Contractor Classification

Restricts the use of independent contractors to very few

Downplays the “control test”

Narrows the focus on economic dependence

Economic realities viewed in relation to one another

No single factor is determinative.
Can You Defend Contractor Status?

- Does the worker or company...
  - control the details of the work (worker's job)
  - supply the equipment to do the work?
  - have an opportunity to make a profit or suffer a loss in performing the work at issue?
- Is the relationship between the worker permanent or temporary?
  - Is the work of an “on again, off again” nature?
- Does the job require worker skill and initiative?

Can You Defend Contractor Status? (cont’d)

- Evaluate all contract workers in meeting the Common Law Test and the FSLA definition
- Assure that each has an agreement in place that addresses the following:
  - Include statement that the business lacks control over the means by which the worker performs his/her duties
  - Term of the agreement is on a project-by-project basis, and that both parties intend the worker to be an independent contractor
Contractor Agreement Contents

- Worker uses his or her own equipment and tools.
- Worker may perform services for other businesses.
- Worker can assign tasks to others.
- Worker provides his or her own liability insurance and benefits.
- Worker is not eligible for employee benefits.
- Worker has his or her own business and tax identification number.
- Worker has the opportunity to receive bonuses or chargebacks.
- States that the company will comply with the terms of the agreement with contractors.

Resources on Misclassification of Workers

Administrators interpretation No. 2015-1

http://www.dol.gov/whd/workers/Misclassification/

https://blog.dol.gov/2015/07/15/employee-or-independent-contractor/
Federal Family Medical Leave Act

FMLA

New regulations went into effective March 8, 2013

Wage and Hour Division
Family Medical Leave Act
http://www.dol.gov/whd/fmla/
Are You a Covered Employer?

An employer is covered if it employs **50 or more** employees for **each working day** during each of **20 or more calendar weeks** in the **current or preceding** calendar years.

What Employees Are Eligible?

To be eligible for FMLA leave, an employee must:

- Worked for at least 12 months
  - *They do not need to be consecutive*
- Have at least 1,250 hours of service during the 12 month period immediately preceding the leave
- Work at location where employer has at least 50 employees within 75 miles.
## Significant Changes

- Qualified exigency leave now includes **family member of person** serving in the regular armed forces and the National Guard or Reserves.
- "Active duty" now requires **deployment to a foreign country**.
- Adds **new reasons** for which employees may take qualifying exigency leave.

## Significant Changes

- Increase from 5 to 15 calendar days the maximum days an employee may take to spend with a service member on temporary **Rest and Recuperation Leave**.
- Employee returning from USERRA* covered service must be credited with hours of service he/she would have performed but for the USERRA covered absence **In determining eligibility for FMLA leave**.

---

*Uniformed Services Employment and Reemployment Rights Act*
Significant Changes

Related to military caregiver leave

- “Covered service member” now includes veterans who are undergoing
  - medical treatment,
  - Recuperation
  - Therapy for a serious injury or illness

- “Serious injury or illness” parameters expanded

Significant Changes

- Clarifies increments to use to calculate intermittent and reduced schedule leave

- Optional use forms are updated and an additional new form is created.

- A new poster is required
<table>
<thead>
<tr>
<th>What to Do?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>Update</strong> your FMLA policies to reflect changes</td>
</tr>
<tr>
<td>2. <strong>Consider</strong> using the FMLA optional use forms</td>
</tr>
<tr>
<td>3. <strong>Post</strong> the new poster</td>
</tr>
<tr>
<td>4. <strong>Go</strong> to the Wage &amp; Hour Division’s website given earlier for information</td>
</tr>
<tr>
<td>5. <strong>Know</strong> your state requirements.</td>
</tr>
</tbody>
</table>

*FMLA slides courtesy of GillilandLawFirm.com*
Expect More Audits

DOL
Federal & State

Unemployment

OSHA

I-9

Be In The Know - Support

Private Duty Home Care Association Membership

PDHCA Leadership Meeting
Charleston, SC
Jan 31 – Feb 2, 2016

Accreditation through NAHC University

State Home Care Association
The New Home Care Challenges and How to Solve Them

Please Complete Evaluation Form

Pat Drea, COO
NAHC Leadership Meeting 2015