



How to Respond to Significant, New Legal Challenges

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NOTE:

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Wage & Hour

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Companionship Services Exemption

- Home Care Association of American, et al v. David Weil, et al
- Current status
- Options now

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Changes to the “White Collar” Exemptions

- Proposed on July 6, 2015
- Comment period ended on September 4, 2015

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Changes to the “White Collar” Exemptions

- Change to the required salary – projected to be \$970/week (\$50,440/year) when final rule is published in 2016
- Automatic increases annually
- Changes to duties tests?

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Changes to the “White Collar” Exemptions

- What to do now?
 - Determine the potential operational and financial impact for your organization
 - Begin planning what you will do. When the final regulations are published, you probably will not have much time to comply

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Travel Time Pay

- The issue concerns travel during the workday with long breaks between visits
- Do you have to pay for that time?

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Travel Time Pay

- Wage and hour regulations do not answer this question
- Courts' answers are mixed
- In 2014, DOL said you must pay for this travel time in its FAQ forum for home care employers
 - See, www.dol.gov/whd/homecare/faq.htm

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Travel Time Pay

Specifically, DOL stated that when long breaks are involved between client visits:

- You pay the travel time it would have taken an employee to travel directly from one client to the next
- You do not pay for the time spent of the break in which the employee is completely relieved of work duties.

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Travel Time Pay

What should you do?

The **safest option** is to pay for the travel time between visits for nonexempt field staff when long breaks are involved (and to still count these hours for exempt companions).

1. Tell employees in advance that they are completely relieved of duty during their break time between visits.
2. Tell employees in advance that they must not commence work until each scheduled visit starts.
3. Provide employees your estimate of the drive time between client visits and give them an opportunity to dispute or correct your estimate.

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Travel Time Pay

What should you do?

The **riskier option** is to not pay for the travel time between visits when long breaks are involved for nonexempt field staff

1. You risk violating minimum wage requirements
2. You risk violating overtime pay requirements
3. You risk violating recordkeeping requirements
4. You risk paying significant legal fees and fines to defend against any of the above potential claims

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Independent Contractor v Employee

- Administrator's Interpretation No. 2015. July 15, 2015
 - Go to: www.dol.gov/whd/workers/Misclassification/AI-2015_1.htm
- Is the worker truly an independent business or is the worker economically dependent on the employer?

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Independent Contractors v Employee

The factors considered:

- Whether the work is an integral part of the "employers" business?
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
- How does the worker's relative investment compare to the employer's investment

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Independent Contractors v Employee

The factors considered:

- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the “employer” permanent or indefinite?
- What is the nature and degree of the employer’s control?

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Three Common Wage & Hour Problems

- Not knowing if your agency is in compliance with wage and hour requirements
- Assuming an employee is exempt
- Improper calculation of hours worked

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Labor Law

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What is Happening?

- A very pro-union labor board is making many changes that affect every employer subject to the National Labor Relations Act.

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Ambush Elections

- The election will occur very quickly!
- Currently about 42 days from the filing of the election petition until the election.
- This is compressed to about 11-21 days
- The regulation was effective April 14, 2015

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Micro-Bargaining Units

The labor board is now approving very small bargaining units

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Email

- Except in very limited circumstances, employers are now required to allow employees to use the employer's email systems to engage in union organizing and discussions concerning terms and conditions of employment during non-work time.
- Email is now viewed as the modern equivalent of face-to-face solicitations and discussions.

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Email

Limitations include:

- Union organizers/unions and other non-employees do not need to be permitted to use the employer's email systems.
- Employers are not required to give employees who do not use the employer's email to do their jobs access to the email for union organizing or exercise of their other rights.

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Employee Handbooks

- The NLRB has and continues to hold many personnel policies that have been viewed as good personnel practices for decades to be unlawful
- The policies are being viewed as violating the employees right to engage in concerted action for mutual aid and protection.

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Employee Handbooks

Examples:

- Confidentiality of workplace investigations
- Confidentiality of information
- Social media
- Courtesy
- Negativity

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Employee Handbooks

Resource:

- General Counsel Memorandum GC 15-04
March 18, 2015

<http://apps.nlr.gov/link/document.aspx/9031d4581b37135>

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HIPAA

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When Is Your Agency Covered by HIPAA?

- Is it a “health care provider?”
 - Health care provider is defined very broadly
- If so, is it covered by HIPAA?
 - Does it transmit information in one or more of 10 types of transactions?
- Resource: www.gillilandlawfirm.com/articles/

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Mandatory Penalties

- Three tiers of penalties
- With one exception penalties are mandatory

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Audits

- HHS is now required to perform routine audits of covered entities and of business associates
- Enforcement is no longer complaint driven

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Common Reasons for Breaches

- Theft
- Unauthorized access to, use, or disclosure of PHI
- Loss of electronic media or paper records containing PHI
- Hacking electronic equipment or network server
- Improper disposal

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Common Reasons for Breaches

Breaches Affecting Fewer than 500 Individuals

- Misdirected communication
- Theft
- Loss
- Hacking
- Improper disposal

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Mobile Devices Are
High Risk

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Why Comprehensive Policies and Training Are Important

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Helpful Resources

- HHS HIPAA Audit Protocol
 - www.hhs.gov/ocr/privacy/hipaa/enforcement/audit/protocol.html
- HHS Security Assessment Tool
 - www.healthit.gov/providers-professionals/security-risk-assessment-tool

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