

## A Legal Update on Private Duty with Bill Dombi and Angelo Spinola



### Agenda

- Welcome
- What is PDHCA and what do we do?
- Overview of series
- **Bill Dombi:** Companionship survey and changes in Medicare Advantage coverage
- **Angelo Spinola:** Current Litigation Trends in the Homecare Industry
  - Challenges to Effective Date of Homecare Exemption
  - Update on Salary Increases for Exempt Employees
  - Status of Challenges to Class Action Waivers in Arbitration Agreements

Federal Court Cases Alleging FLSA Violations Against Home Care Companies	State	Class/Collective	Individual	Dept. of Labor	Total Actions
	October 1, 2015 to present	Alabama		2	
	Arizona		3		3
	Arkansas	2			2
	California	5	1		6
	Colorado	3	1		4
	Connecticut	2	4		6
	Delaware		1		1
	Florida	25	28		53
	Georgia	5	7		12
	Illinois	9	1		10
	Iowa	3	1		4
	Indiana		4	1	5
	Kansas	2	2		4
	Kentucky	1			1
	Louisiana	6	1		7
	Maryland	3	60		63
	Michigan	2	3	1	6
	Minnesota	3		1	4
	Mississippi	1	2		3
	Missouri	4	2		6
	New Jersey	3	3		6
	New York	51	23		74
	North Carolina	3			3
	North Dakota	1			1
	Ohio	40	50		90
	Oregon		1		1
	Pennsylvania	8	5	1	14
	Rhode Island	1			1
	South Carolina	1	1		2
	Tennessee	8	4		12
	Texas	31	17		48
	Virginia		3	1	4
	West Virginia		1		1
	Wisconsin		1		1
	<b>Current Total</b>	<b>223</b>	<b>232</b>	<b>5</b>	<b>460</b>

Incorporating state court cases would approximately double these numbers.

\* The Maryland individual filings and 40 of the Ohio individual filings arise from the decertification of a large class action.


## Executives Named as Defendants in Wage Hour Lawsuits and Risk of Personal Liability

- Executives being named more frequently as individual defendants and the fact that there can be individual liability for these suits based on the theory that the executive is the employer.
- Argument is that the executive is also the employer under a joint employment standard because the executive sets the policies and pay relating to company employees. The smaller the company, the bigger the risk.
- Recent Cases:
  - *Dudley v. Hanzon Homecare Services, Inc. F/K/A Mel's Quality Care Services, Inc. et al*, 2018 WL 481884 (Jan. 17, 2018)
    - FLSA and NYLL collective and class action against former employer, Hanzon Homecare Services, Inc, and Hanzon's owner, Melsada Morrison
  - *Castleman, Kimberly v. Care Madison, LLC et al*, 3:15-cv-00723
    - FLSA collective action against former employer, Care Madison, and its President, Stanley Jefferson
  - *Fries v. Residential Home Health Care, LLC et. al*, 1:16-cv-03727
    - FLSA collective action against former employer and its President, David Curtis

## Department of Labor Wage Hour Lawsuits

- *Acosta v. Revolutionary Home Health, Inc., et al.*, 3:17-cv-01992
  - Lawsuit brought against company and co-owners, Jennifer Feldra and Kathleen Evanina, alleging defendants did not pay employees overtime and failed to maintain accurate records in violation of the FLSA.
- *Acosta v. Rightway Homecare Services, Inc, et al.*, 18-cv-00784
  - Lawsuit brought against company and its owner, Abiola Mustapha, alleging defendants did not pay employees overtime and failed to maintain accurate records in violation of the FLSA.
- *Acosta v. Mercy Services of Health, Inc., et al.*, 1:18-cv-00366
  - Lawsuit brought against company and John Ndunguru, the owner and president, alleging defendants failed to pay employees overtime in violation of the FLSA.
- *Acosta v. Therapeutic Alliance, LLC, et al.*, 1:18-cv-00270
  - Lawsuit brought against company and Alkesh Patel, the president and owner, alleging defendants failed to pay employees overtime in violation of the FLSA.

## Arbitration Agreements

- ✓ Critical to avoid class action lawsuits with high potential liability
  - ✓ Complicated if unions or existing litigation
  - ✓ Various options for implementation
  - ✓ Optional additional steps before arbitration
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- Courts are divided about the enforceability of arbitration agreements that have class action waivers but no ability to opt out.
  - U.S. Supreme Court heard three cases on arbitration agreements with class action waivers and no opt-out provisions in Oct. 2017.
  - Cases suggest recently appointed Justice Gorsuch may rule in favor.

## Commonly Targeted Practices: Understand and Learn To Avoid

- Not paying orientation, training
- Misclassifying independent contractors
- Missed or interrupted meals
- Not monitoring or paying remote work (e.g., charting)
- Reported hours being inconsistent with other records
- Rounding above certain intervals or pattern of rounding down
- Delaying pay if time sheets or paperwork are late
- Paying mileage vs travel time
- Not reimbursing mileage for minimum wage workers
- Not including on-call pay and bonuses in overtime
- Not paying for meetings and “non-productive” time
- No scheduling agreement for live-ins/ 24-hour caregivers
- Manipulation of pay rates
- Pay per visit practices of skilled and hospice care providers

## Effective Date of the Home Care Exemption

- The effective date of the elimination of the home care exemptions as being retroactive to January 1, 2015 has remained a contentious point and courts across the country are “split” on the issue.

### January 1, 2015 Effective Date States:

- Connecticut
- New York
- Colorado
- Iowa
- Arkansas
- Florida
- Tennessee
- Ohio
- Missouri
- Pennsylvania
- West Virginia

### October 13, 2015 Effective Date States:

- Virginia
- Louisiana

## Salary Increase Litigation

- A 2017 decision from the U.S. District Court for the Eastern District of Texas effectively nullified the DOL's attempt to raise the exempt salary level to \$913 per week.
- The DOL appealed the District Court's decision, but that case has been stayed for now.
  - While the case is pending, the DOL continues to engage in its rulemaking procedure to determine what the new salary level should be.