

Second Legal Update on Private Duty with Bill Dombi and Angelo Spinola



Agenda

- **Welcome**
- **Bill Dombi**
- **Angelo Spinola: State Law Trends**
 - Compensability of Sleep Time
 - Predictive Scheduling Laws
 - Paid Sick Leave
 - Legislation Seeking Disclosure of Caregiver Information
 - Compensability of Pre-Hire Paperwork and Orientation Time
 - On-Call Pay Practices

State	Class/Collective	Individual	Dept. of Labor	Total Actions
Alabama		2		2
Arizona		3		3
Arkansas	2			2
California	5	1		6
Colorado	3	1		4
Connecticut	2	4	1	7
Delaware		1		1
Florida	26	29		55
Georgia	5	7		12
Illinois	10	1		11
Iowa	3	1		4
Indiana		4	1	5
Kansas	2	2		4
Kentucky	1	1		2
Louisiana	6	2		8
Maryland	4	60	1	65
Michigan	2	3	1	6
Minnesota	4		1	5
Mississippi	1	2		3
Missouri	4	3		7
New Jersey	4	3		7
New York	55	26		81
North Carolina	3			3
North Dakota	1			1
Ohio	42	50		92
Oregon		1		1
Pennsylvania	8	6	1	15
Rhode Island	1			1
South Carolina	1	1		2
Tennessee	9	4		13
Texas	32	19		51
Virginia		3	4	7
West Virginia		1		1
Wisconsin		1		1
Current Total	236	242	10	488

**Federal Court Cases
Alleging FLSA
Violations
Against Home Care
Companies**

October 1, 2015 to present

*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.

Recent DOL Cases

- Acosta v. Rightway Homecare Services, Inc., et al. (Minn. 3/21/2018)
- Acosta v. Mercy Services of Health, Inc., et al. (Va. 3/23/2018)
- Acosta v. Care at Home, LLC, et al. (Ct. 4/24/2018)
- Acosta v. Medical Staffing of America, LLC dba Steadfast Medical Staffing, et al. (Va. 5/2/2018)
- Acosta v. At Home Personal Care Services, LLC, et al. (Va. 5/8/2018)
- Acosta v. High Quality Care Nursing Agency, Inc. (Md. 5/11/2018)
- Acosta v. Access Home Care, Inc., et al. (Va. 5/16/2018)

Live-Ins and Extended Shift Caregivers

- **To be considered a Live-In:**
 - Resides on an employer’s premises seven days a week such that he or she has no other home; or
 - Lives, works, and sleeps on the premises 5 days per week and 120 hours or more; or
 - If he or she spends less than 120 hours working and sleeping on the employer’s premises, he or she spends five *consecutive* days or nights residing on the premises.
- **For caregivers who are not Live-Ins but are on-duty for 24 hours or more:**
 - Off-duty time (*i.e.*, rest periods) can “break” the 24-hour shift
 - Meal periods do not “break” the on-duty time



PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION AND/OR ATTORNEY WORK PRODUCT

Federal Law on Sleep Time

- Sleep time can be excluded from work time only if employee is on duty 24 hours or more, and employee:
 - Agrees that up to 8 hours of sleep time will not be paid
 - Has adequate sleeping facilities
 - Is generally able to enjoy an uninterrupted night of sleep
 - Is paid for any interruption of sleep time
 - Is paid for the entire night if the employee gets less than five hours of uninterrupted sleep
- Up to three, one-hour off-duty meal periods also may be unpaid
- Caregivers who are on duty for 24 hours or more are *not* necessarily live-in caregivers



New York Law on Sleep Time

- NY Department of Labor March 11, 2010 Opinion Letter
- Federal court follows NY DOL Opinion
 - *Severin v. Project Ohr, Inc.*
- NY Supreme Court, 2nd Dept., rejects NY DOL Opinion
 - *Andryeyeva v. New York Health Care, Inc.*
- NY Supreme Court, 1st Dept., weighs in
 - *Tokhtaman v. Human Care, LLC*

California Law on Sleep Time

- Home care employers historically have deducted eight hours of sleep time from hours worked based on the federal standard.
- In *Mendiola v. CPS Security Solutions, Inc.* (Jan. 8, 2015), the California Supreme Court ruled that California courts will not incorporate a federal standard on non-compensable time without convincing evidence of the Industrial Welfare Commission's intent to exempt the same. Wage Order 15 does not incorporate the federal standard for excluding sleep time.
- Most viable option for excluding sleep time is to ensure the time is not considered "hours worked," i.e., uninterrupted and can leave premises.
- Other options: Paid sleep time, providing relief caregivers, other alternate staffing

Additional Concerns for Live-In Caregivers

- Calculating total hours worked
 - Sleep Periods
 - Meal Periods
 - Other Off-Duty Time
- Reasonable agreement
- Distinct time sheet and certification



Predictive Scheduling Laws

- Beginning with San Francisco in 2014, many states and municipalities have enacted laws aimed at providing more scheduling predictability to hourly workers.
 - Oregon (effective July 1, 2018)
 - California
 - Berkley
 - Emeryville
 - San Francisco
 - Seattle, Washington
 - New York City
 - Pending legislation for New York State

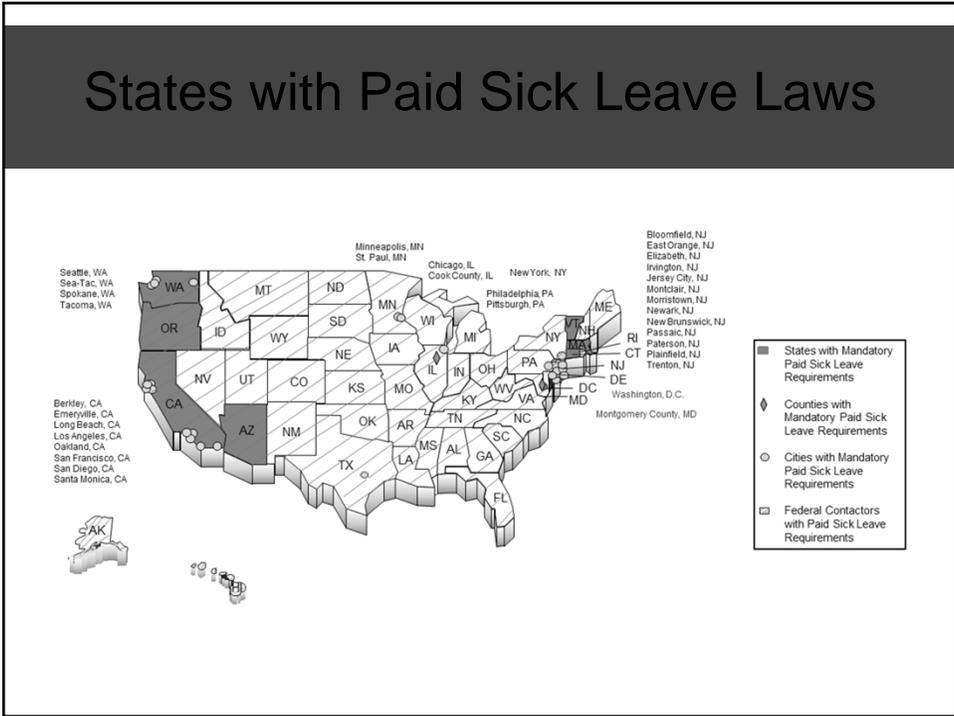
Increases to State Minimum Wage

Eighteen states increased minimum wage at the start of 2018:

- Alaska: \$9.84 (\$.04 increase)
- Arizona: \$10.50 (\$.50 increase)
- California: \$11.00 (\$.50 increase)
- Colorado: \$10.20 (\$.90 increase)
- Florida: \$8.25 (\$.15 increase)
- Hawaii: \$10.10 (\$.85 increase)
- Maine: \$10.00 (\$1.00 increase)
- Michigan: \$9.25 (\$.35 increase)
- Minnesota: \$9.65 (\$.15 increase)
- Missouri: \$7.85 (\$.15 increase)
- Montana: \$8.30 (\$.15 increase)
- New Jersey: \$8.60 (\$.16 increase)
- New York: \$10.40 (\$.70 increase)
- Ohio: \$8.30 (\$.15 increase)
- Rhode Island: \$10.10 (\$.50 increase)
- South Dakota: \$8.85 (\$.20 increase)
- Vermont: \$10.50 (\$.50 increase)
- Washington: \$11.50 (\$.50 increase)

Wage Theft Laws

- Employers must provide written notice of wage rates to new hires.
- Notice generally requires:
 - Rate or rates of pay, including overtime rate of pay (if it applies)
 - How the employee is paid: by the hour, shift, day, week, commission, etc.
 - Regular payday
 - Official name of the employer and any other names used for business (DBA)
 - Address and phone number of the employer's main office or principal location
 - Allowances taken as part of the minimum wage (tips, meal and lodging deductions)



Additional Considerations for Paid Sick Leave

- **Certain jurisdictions expressly require policies or notice**
 - Arizona, California, Connecticut, Chicago, Maryland, Massachusetts, New Jersey, New York City, Oregon, Philadelphia, Seattle, Vermont
- **Even if a jurisdiction does not require policies or notice, they are needed if:**
 - Employer is using a paid leave policy that needs slight revisions to be compliant
 - Employer is in a jurisdiction that does not have “hard” caps. In other words, the jurisdiction provides that an employer “may” set a cap.

Legislation Requiring Disclosure of Caregiver Information

California's AB 1513

- Under the existing law, the State Department of Social Services maintains a registry of home care aides and applicants on its website.
 - Allows consumers to verify that a particular caregiver is licensed, but does not disclose personal contact information.
- Amendment would have given labor unions access to caregiver's names and telephone numbers for the purposes of union organizing.

Latest version is California AB 2455

Compensability of Pre-Hire Paperwork

- Time spent completing pre-hire paperwork is generally not compensable if:
 - Onboarding paperwork is a condition of employment
 - Pre-hire requirements are routine paperwork (e.g., direct deposit and tax forms)
 - Employer lacks control over when paperwork is completed (e.g., online paperwork completed at new hire's convenience)
- Time spent completing pre-hire paperwork is generally compensable if:
 - Paperwork benefits the employer
 - Takes a substantial amount of time or is burdensome
 - Involves learning about the company or reviewing company specific policies
- Employers can pay employees at a lower rate for time spent completing new hire paperwork

On-Call Pay Practices

When On-Call Time Should Be Paid

- If employee cannot use the time effectively for own purposes
 - Required to stay on or close to employer's premises
 - Limitations on employee's use of time, e.g., frequent calls
 - *Not* just because employee has to carry a pager or phone or give a number where s/he can be reached.

How On-Call Time Should Be Paid

- Exempt: May receive a premium, but do not need to be paid anything extra. Do not need to track or record work performed, but make sure they are properly classified – the DOL and plaintiffs' attorneys look for this. [Hint: Try to have exempt employees handle on-call time.]
- Non-exempt: May receive a premium for being on-call (which must be included in the regular rate). Must be paid at least minimum wage for work performed while on-call and must separately track and record on-call working time. If on-call working time is over 40 hours, must be paid at the overtime rate.



Compensability of Orientation and Training

- Orientation is generally compensable working time.
 - FLSA has very narrow parameters for unpaid orientation that resemble vocational programs that benefit the employee population at large.
- Training/meeting time is compensable work time unless all four of the following requirements are met:
 - Attendance is outside regular working hours;
 - Attendance is voluntary;
 - Training/meeting is not job-related; and
 - Employee does not perform any productive work.
- Orientation and trainings/meetings can be paid at a different rate.



Trainings and Orientation: Exceptions

- Some state-required trainings can be unpaid, if certain additional conditions are met, typically:
 - Similar to vocational training, *i.e.*, no company-specific content
 - Training is for the benefit of the employee
 - Company gets no immediate benefit (minimal or no productive work)
 - Employee understands he or she is not entitled to wages for the time spent training
- ! **STATE VARIATION:** This narrow exception to paying for job-related trainings/orientation is highly state-specific. Consult with an attorney before offering unpaid trainings/orientation.
 - *E.g.*, Arkansas 40-hour home health aide training course can be unpaid, if no company-specific content is included.

State-Specific Considerations

Example: Show-up pay under New York law:

- If an employer requests or permits an employee to report for work on any given day, the employer must pay the employee a minimum of 4 hours of work or for the employee's entire shift, whichever is less, at no less than the standard minimum wage. This requirement applies regardless of whether the employee performs any work. [e.g., absent client]

Example: Payment of expenses under California law:

- An employer must indemnify an employee for all necessary expenditures or losses incurred by the employee in direct consequence of performing his/her duties or per the employer's instructions. [e.g., cell phone for mobile app]





**Home Care
Toolkit**

Onboarding Resources

- Employment application
- Background check/ Fair Credit Reporting Act materials
- Arbitration agreements

Continuing Employment Resources

- Overtime, minimum wage, travel time, and visit rate policies
- Live-in and extended shift caregiver agreements
- Disciplinary forms, performance reviews
- On-call agreements (exempt, non-exempt)

End of Employment Resources

- Termination letters
- Separation agreements

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GPS Survey Topics

- Background Checks
- Business Restructuring
- Cell Phone/Texting
- Child Labor
- Civil Procedure
- Discrimination/Harassment
- Employee Benefits

- Human Resources
- Immigration
- Leaves of Absence
- Privacy
- Unemployment
- Wage and Hour
- Workplace Safety

Over 82 50 state Surveys on Labor and Employment Topics

State Specific Materials



Thank
You!



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Questions and Answers

