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303  Latest Employment Law Trends in the Home Care Industry
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We strongly encourage you to consult legal counsel of your choice on specific matters involving employment law, and important personnel policies and practices prior to adoption or implementation.
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This session will cover:

• The Big Picture
• Some Commonly Targeted Practices
• Compliance Strategies
• Q&A
In the News: Trump’s Labor Chief Pick Scalia No Stranger to the Job

• Gene Scalia to take over as Labor Secretary

• Fast Facts on Scalia:
  – Son of the Former Supreme Court Justice Antonin Scalia
  – Former Department of Labor solicitor
  – Experience includes representing businesses in lawsuits challenging prior DOL rules, during the Obama administration, including tip pooling
    • Scalia argued that the DOL lacked the authority to restrict tip pooling

• Forecast shows business oriented changes

In the News Continues

Home care workers and allies speak up for quality care and workers’ rights

On behalf of the hundreds of thousands of SEIU home care members—and the countless more who benefit from their care, their advocacy, and their fight for good union jobs—we thank you

By: SEIU

On July ’12, just a couple weeks after the U.S. Supreme Court’s decision in Janus v. AFSCME, the Centers for Medicare and Medicaid Services (CMS) issued a proposal to stop home care workers from contributing their own wages to support their union in the same way teachers, police officers and firefighters do.

This transparent political attempt to interfere with home care workers’ freedom to stand together in their union and advocate for higher wages, skilled training, and basic benefits also undermines quality home care for older Americans and people with disabilities.
In the News: Fight for $15 and a Union

• Home care workers in Colorado are advocating for $15 per hour and the ability to unionize without fear of retaliation.

• Trend of “Taking 15 for $15”: social media effort to take a 15 minute break and share why you support home care workers.

In the News: Caregiver Information Disclosure Legislation

• Aimed at union organizing and active in California, Colorado, Connecticut (recently tabled), and Massachusetts.

• California (AB 2455):
  – Approved by the Governor on 9/29/18.
  – For any new registration or renewal occurring on or after July 1, 2019, an electronic copy of an aide’s name, telephone number, and cellphone number will be available upon request by a labor organization.
  – Opt-out procedure available.
  – Lawsuit filed on July 3, 2019 challenging legality of the law.

• Colorado (SB19-238):
  • Passed the General Assembly on May 17, 2019.
  • Affects agencies providing Medicaid Services in the state. As part of an effort to increase caregiver wages, employers have to provide caregiver personal information on an annual basis.
In the News:
Caregiver Information Disclosure Legislation

- Connecticut (Bill No. 1051):
  - Tabled May, 2019.
  - Would have established a registry, assigning each employee a unique ID number and maintaining the following information:
    - The employee’s full name;
    - Job title;
    - Date of hire;
    - Self-identified gender;
    - Home address;
    - Mailing address;
    - Telephone number;
    - Electronic mail address;
    - Full legal name of the agency employing the employee; and
    - List of home care trainings offered by the employing agency or its designee and the completion date of any training.

- Massachusetts (Bill H. 3821):
  - Signed by the Governor on 11/24/2017.
  - Requires home care agencies to report the following information:
    - The employee’s full name;
    - Identification number;
    - Gender;
    - Home address;
    - Mailing address;
    - Full legal name of any home care agency employing the individual;
    - Job title; and
    - List of home care trainings or certifications completed.

In the News Continued

- Domestic Workers’ Bill of Rights:
  - CA, CT, HI, IL, MA, NV, NY, OR, Seattle all currently have a version.
  - Federal domestic workers’ bill of rights next?
    - Introduced on July 15, 2019:
      - Would cover nannies, housecleaners, and home-care workers.
      - Would extend workplace discrimination protections and establish wage standards.

- Predictive scheduling efforts
  - VT
  - Close call in NY
  - Illinois may be next
  - Other states have targeted other industries for now

- Focus on hiring speed and restrictive covenants to address caregiver shortages
- Focus on HIPAA compliance and privacy rights
- Coalition building to address predictive scheduling, union efforts, federal bill of rights and other issues that impact the industry at large
Exemptions Relevant to Home Care

• Professional Exemption
  – Advanced knowledge in a specialized field
  – Paid salary or fee

• Administrative Exemption
  – Discretion and independence
  – Paid salary or fee

• Executive Exemption
  – Two or more full-time employees
  – Paid salary

Misclassification Issues

• Home care agencies often classify the following staff as exempt:
  – Care coordinators (administrative/executive);
  – Schedulers/scheduling managers (administrative/executive);
  – Marketing coordinators (outside sales).

• Recently filed cases have alleged that the positions are nonexempt, meaning overtime, rather than exempt.

• The Department of Labor has taken the position that, particularly as it relates to “scheduling managers,” the position(s) may be nonexempt when:
  – Administrative exemption: not enough decision making discretion
  – Executive exemption: not enough supervisory/management authority
Exemption Updates

- Final rule published on September 24, 2019 increases $455/week ($23,660 annual) salary threshold to $684/week ($35,568 annual);
- Increases the total annual compensation requirement for highly compensated employees from $100,000 annually to $107,432 annually; and
- Allow employers to use nondiscretionary bonuses and incentive payments (this includes commissions) to satisfy up to 10% of the standard salary level ($3,556.80).

Alternate Compensation Methods

- Pay-Per-Visit
  - Involves professionals who are paid on a visit rate, or fee, for completing patient visits and additional hourly compensation for non-visit work.
  - Employees must track their hours worked so that they can be paid overtime if they work more than 40 hours in a workweek.
  - This method encourages productivity, but may not control labor costs as well.
- Salary Plus
  - Provides a guaranteed weekly salary with the option to earn additional incentive compensation (i.e. productivity-based bonus).
  - Salary is usually set at about 75% of the target overall comp.
  - Visits are assigned points, similar to the pay per visit method.
  - Once a clinician earns a threshold number of points, each additional point has a dollar value that goes toward a bonus.
  - Exemption is not lost when an exempt employee who is guaranteed $455/week on a salary basis also receives additional compensation on any basis: flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis.
  - There may be a requirement of a “reasonable relationship” between the guaranteed salary amount and the total earnings.
  - This still controls labor costs but is a better incentive for additional work.
The Problem(s) with PPV

• Mixing fee-basis pay and “pay based on hours worked”
  − Elwell v. University Hospital Home Health Care Services (6th Cir. 2002) (binding in Ohio, Mich. Kentucky, Tenn.) (not permitted for same task)
  − Rindfleisch et al. v. Gentiva Health Services (N.D. Ga. 2013) (cannot mix fee pay with pay that considers the duration of the task)

• Considering time in setting the fee – Rindfleisch v. Gentiva

• Uniqueness
  − Fazekas v. Cleveland Clinic Health Care Ventures (6th Cir. 2000) (exempt if PPV only and visits are unique).
  − Wage & Hour Administrator opinion letters state that predetermined visit fees indicate visits are not unique.

PPV in California

**AB 1513 created section 226.2 of the California Labor Code, effective January 1, 2016, which applies to all employees compensated on a piece-rate basis:**

• Employees must be separately compensated for the time to take rest and recovery breaks. These breaks must be paid at an hourly rate no less than the greater of either the applicable minimum wage or the employee’s average hourly wage for all time worked (exclusive of break time) during the work week.

• Employees must be separately compensated for “other nonproductive time,” defined as “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.”

• This “other nonproductive time” must be compensated at an hourly rate no less than the applicable minimum wage.

• Employee wage statements must include the total hours of compensable rest and recovery periods, the rate of compensation for those periods, the gross wages paid for those periods during the pay period, and the total hours of other nonproductive time (including the rate of compensation and gross wages).
Wage Theft Laws

• State-specific, although generally employers must provide written notice of wage rates to new hires.

• Notice typically 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)

DIGGING DEEPER INTO RECENT DOL INVESTIGATIONS & LITIGATION
Litigation Forecast

Obama Playbook Still Governs Policing of Home Care Pay (1)
By Chris Opler
Apr. 24, 2019 6:16AM Updated: Apr. 24, 2019 12:08PM

- Home care companies hit with lawsuits for unpaid overtime
- Labor Department cites Obama regulation removing exemption

The Labor Department continues to go after home care companies for minimum wage and overtime pay violations, putting to rest, for now, any debate over whether Congress meant for the rapidly growing industry to be covered by federal wage law.

The DOL recently won a nearly $130,000 judgment against a Virginia home care company that department lawyers said misclassified workers as independent contractors and failed to pay them overtime.

The verdict is a relative drop in the bucket for a $103 billion industry. It's likely to get some attention, however, because the court made the owner of the company—At Home Personal Care Services LLC—personally liable for the unpaid wages and additional liquidated damages.

The department in the last month has also secured a $1.2 million victory against another home care business and filed similar lawsuits against at least three other providers. The DOL's Wage and Hour Division is seeking to hold the owners of those companies in Missouri, Pennsylvania, and Wisconsin personally liable for unpaid overtime.

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., work at home & wait times)
- 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
- Inconsistent time records from multiple timekeeping sources
- Pay per visit practices of skilled and hospice care providers
Rate Manipulation Claims on the Rise

Federal law prohibits "device[s] to evade" overtime

• Don't go near...
  ◦ Rate adjustments by number of hours worked or length of work week
  ◦ After-the-fact rate adjustments

• But these are okay...
  ◦ Rate adjustments by client
  ◦ Premiums for certain types of shifts

Tricky: Any overtime worked must be calculated based on the weighted average of the "regular" rate

Example from DOL Lawsuit filed Dec. 21, 2018:
"...[A]fter January 9, 2016, Defendants lowered the rate of pay for home health aides from their original rate to the Ohio minimum wage of $8.15 per hour for regular hours, then used the lower rate to compute and pay time and one-half for overtime hours, and then paid a "bonus" to restore the employees to the same amount they would have earned prior to January 9, 2016. In addition, after Plaintiff's representatives from the Wage and Hour Division informed Defendants that this pay reduction and bonus plan violated the FLSA, Defendants divided home health aides' work hours based on the client's funding source (Medicaid or Passport) and then issued two pay checks to avoid paying overtime."

Sample Caregiver Agreement

3. **Compensation**

   A. **Base Pay Rate.** All earnings of Employee shall be paid on a [weekly/biweekly] basis in accordance with Employer’s standard payroll practices, and will be subject to all deductions and withholdings required by law. Employee shall receive a base pay rate of $________ per hour for all time spent performing work for a client visit. Employee understands and acknowledges the base pay rate may change depending upon the client and/or type of assignment, for reasons including but not limited to client reimbursement rates, pay sources, time sensitivity, and types of services provided, but expressly not including the number of hours worked in the workweek or for the purpose of reducing overtime pay. If Employee’s base pay rate changes, whether for a particular assignment or for all assignments, Employee will receive notice to the extent required by state law.
**FLSA Rules for Travel Time**

- Travel between several clients during the workday is compensable hours.
- If there is a long break between two different client visits, and the caregiver is completely free to pursue personal activities, you can exclude the break time from hours worked. However, you must still pay the estimated travel time it would have taken the caregiver to drive between the two clients.
- You can pay a different rate for travel time, as long as it is not below minimum wage.
- Travel time must be recorded and included in the regular rate.
- Travel time pay is a wage; mileage is an expense reimbursement.

**Sample Travel Policy**

The Company will compensate employees for time spent traveling for purposes of conducting the Company’s business in compliance with applicable state and federal law. This compensation is for the time the employee spends traveling and does not include mileage, which is compensated separately.

Compensable travel time includes an employee’s business travel between work sites during the workday, but does not apply to time spent in the employee’s regular commute to work, which includes travel from home to the first work site at the beginning of the workday and travel from the last work site to home at the end of the workday, unless applicable law requires otherwise.

You are not expected to accept or make calls or complete any paperwork before you begin your commute or after you finish your commute. Any work that is approved for you to do at home can be done on your own schedule. There is no work that you will be asked to do immediately before or immediately after your commute.

Travel between Work Sites: Employees must accurately record as time worked all time spent traveling between work sites during the workday. For non-exempt employees, time spent traveling between work sites during the workday is counted as hours worked for purposes of calculating hours of work and overtime premiums and eligible non-exempt employees will be paid overtime in accordance with applicable federal and state law.

Special Commute to Work Sites: If traveling to a particular work site at the start of the workday or from a work site at the end of the workday extends a non-exempt employee’s day past the employee’s normal commute time, the additional travel time will be compensated. On these occasions, employees must report the extraordinary commuting time to their manager and record as time worked the extra time spent commuting to and from a client site that exceeds their regular commute time.

Failure to adhere to this policy, including failure to record all compensable travel time and failure to record all work will be addressed as a performance issue and the employee will be subject to discipline, up to and including termination from employment.

Any questions about this policy, or any associated procedures, should be directed to your manager, Human Resources, or the Payroll Department.
Expense Reimbursement at the State Level

• Must reimburse all reasonable and necessary expenses.
  – California → broad interpretation of reasonable and necessary business expenses
  – Illinois → Governor signed a nearly identical law, effective January 1, 2019

• Mileage – Not required in every state unless failure to pay results in a minimum wage or overtime violation. Pay the IRS rate and receive a presumption.

Make Sure to Also Keep In Mind…

In applications and onboarding, don’t forget about the Telephone Consumer Protection Act:

− Need consent before sending automated (i.e. not typed by human fingers) texts or making automated calls.
− Type of consent needed depends on the type of message.
− Best practice is to obtain explicit consent (i.e., opt in) for sending automated text messages
Rules for Working at Home or Away from the Office or Client’s Home

If the employer knows or has reason to believe work is being performed at home, it must be counted as compensable hours worked.

- What times are you emailing and texting your caregivers?

- What times are caregivers and office employees entering data on your electronic systems?

On-Call Time

- An employee required to remain “on call” on the employer’s premises or so close that he or she cannot use the time effectively for his or her own purposes is working while “on call.”

- On the other hand, an employee required to remain on-call but who is only required to leave word at his or her home or with company officials where he or she can be reached is NOT working while on-call.

- Requiring an employee to wear a paging device while on-call does not interfere with the employee’s freedom so as to make the time compensable.
Paying On-Call Time the Right Way

When On-Call Time Should Be Paid:
• Compensable 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 compensable 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 for being on-call, but do not need to be paid anything beyond salary. Do not need to track and record work performed.
• 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 working 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.

PROACTIVE COMPLIANCE MEASURES
Compliance is the Best Defense

Strong legal presumption that all employees are entitled to minimum wage and overtime pay.

- Burden is always on the employer to establish an exception from the general rules.
- Workers cannot waive their rights.
- Violations are “strict-liability” offenses.

The best defense is a good offense.

- Train workers and supervisors.
- Implement good policies and consistently enforce them.
- Documentation—practices are only as good as the proof.

Compliance Basics

*Know Your Compliance Status*

- Audit for legal compliance and messaging. Make a plan for improvement.
- Document your compliance measures (good faith)

*Arbitration Agreements*

- Consider a mandatory arbitration agreement with a class action waiver (BIG WIN for employers in 2018)

*Get Familiar with (and Help with) State Laws*

- Some states and localities have complex additional requirements
More On Arbitration Agreements

- Critical to avoid class action lawsuits with high potential liability
- Complicated if existing litigation
- Opt out agreements versus mandatory agreements
  - AT&T Mobility v. Concepcion: April 2011, U.S. Supreme Court held that class action waivers in arbitration agreements are enforceable.
  - The Supreme Court’s May 21, 2018 decision in Epic Systems Corp. v. Lewis held that arbitration agreements are to be enforced on the same grounds as any other contract.
    - This means... agreements with class action waivers are subject only to general defenses such as fraud, duress, and unconscionability.
    - Big win!
  - Anheuser-Busch, LLC: May 22, 2019, mandatory arbitration agreements applicable to unions.
Arbitration Agreements Continued

Where things can go wrong:
- Using a poorly drafted agreement
  - Failing to list company owners or franchisors as protected parties
- Using an independent contractor arbitration agreement for a W-2 employee
  - Calling the employee an independent contractor or vice versa
- Using forms that are not filled in, i.e. leaving blanks or fill-in spaces open
  - Forgetting to fill in the party names
  - Forgetting to fill in where to send the opt-out form
  - Failure to maintain an electronic copy of the agreement

Critical Policies for Home Care Employees

- Explanation of overtime eligibility
- Prohibition of off-the-clock work
- Explanation of meal and rest periods
- Details of travel time compensability
- Requirement to record all working time
- For employees paid-per-visit:
  - Explain all visit-related activities are compensated via the visit rate
  - Consider transitioning to salary-plus compensation system
  - For non-exempt PPV employees, consider giving an example of overtime calculations
Littler Home Care Toolkit

Littler Home Care Toolkit – Provides home care providers with state specific guidance and materials to manage employees throughout the lifecycle of employment

• 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
  – Pay Per Visit compliance materials
  – Disciplinary forms, performance reviews
  – On-call agreements (exempt, non-exempt)

• End of Employment Resources
  – Termination letters
  – Separation materials

To learn more about the Home Care Toolkit, please visit “Service Solutions” on Littler.com:

https://www.littler.com/service-solutions/home-care-toolkit

(“Request More Information”)

OR

Text “Littler” to 55000
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Please be advised that this toolkit is not a “do-it-yourself” guide to resolving employment law disputes. The materials are for informational purposes only, not for the purposes of establishing an attorney-client relationship or providing legal advice, and should not be relied upon as legal advice. This document is intended for use only by Littler Mendelson clients.

[Note: This is a general example of a Travel Time Policy. For use in practice, this example should be reviewed and revised pursuant to the circumstances of each specific employer, including the industry and requirements of state and local law.]

EXAMPLE: Travel Time Policy

The Company will compensate employees for time spent traveling for purposes of conducting the Company’s business in compliance with applicable state and federal law. This compensation is for the time the employee spends traveling and does not include mileage, which is compensated separately.

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