Wage & Hour Update

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Overview

- Status of 24-hour cases, and what to do should the Court of Appeals rule adversely to the home care industry
- New trends in home care wage and hour litigation
- Government investigations of home care
- Common issues with paid time off that is required by federal, state or local laws
- Proposed call-in pay regulations

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Update on the 24-hour Litigation and Recommendations

Court of Appeals Heard Oral Arguments in 24-Hour Cases

- On February 12, 2019, the Court of Appeals heard oral arguments in the *Andryeyeva* and *Moreno* cases. A decision is expected shortly.
- Implications for providers should the Court of Appeals invalidate the 13-hour rule:
  - How to handle existing 24-hour cases, and patients receiving 24-hour care
  - Impact of an adverse decision on current lawsuits
  - NY DOL's plan to formalize the 13-hour rule through regulatory process

Home Care Litigation Trends

Off-the-Clock Claims

- As a general matter, plaintiffs' attorneys becoming more attuned to wage and hour pitfalls in home care, such as:
  - Failure to pay for work-related travel time
  - Failure to pay for time that employees spend in in-service
  - Paying for work based on employees' scheduled work hours versus actual work hours

Travel Time Rules

- Time spent by an employee in travel as part of his principal activity, such as travel from jobsite to jobsite during the workday, must be considered as hours worked.
- An employee who travels from home before the regular workday and returns home at the end of the workday is engaged in ordinary home-to-work travel. This is **not** considered hours worked.

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In-Service

- Attendance at lectures, meetings, training programs and similar activities are viewed as working time ***unless all of the following criteria are met***:
  - Attendance is outside of the employee's regular working hours;
  - Attendance is in fact voluntary;
  - The course, lecture, or meeting is not directly related to the employee's job; and
  - The employee does not perform any productive work during such attendance.

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Time worked versus Time Scheduled

- A review of payroll records indicates that many agencies have historically paid for time scheduled, not time actually worked.
- By definition under the Fair Labor Standards Act, the term "employ" includes "to suffer or permit to work." Work not requested but suffered or permitted to be performed is work time that must be paid for by the employer.

Claims under the Wage Theft Prevention Act

Two Key Requirements of the Law

- **WTPA Notices**:
  - must be issued upon hire and 7 days prior to any changes.
  - must be issued in English and the employee's primary language

- **Paychecks**. Employers must ensure pay statements include all of the following information:
  - The number of regular hours worked and the number of overtime hours worked
  - Rate or rates of pay (regular and overtime)
  - The basis of the rates (i.e., how the employee is paid – by the hour, shift, day, week, commission, etc.)
  - Employee's gross and net wages
  - Itemized deductions
  - Itemized allowances and credits claimed by the employer, if any
  - Employee's name
  - Employer's name, address and phone number
  - The dates of work covered by the payment

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Claims for Overtime Pay Related to 2015 Elimination of Federal Companionship Exemption

Background of the Litigation Related to Regulation Eliminating the Federal Companionship Exemption

- In September 2013, during the Obama administration, the US DOL issued a regulation extending minimum wage and overtime protections under the Fair Labor Standards Act to home care workers who had previously been exempt under the companionship exemption.
  - In New York, this meant that home care agencies would have to pay overtime at 1.5 times the "regular rate" of pay versus 1.5 times the minimum wage.
- The regulation (the "Final Rule") was scheduled to go into effect on January 1, 2015.
- On December 31, 2014, the U.S. District Court for the District of Columbia issued an order staying implementation of the Final Rule.
- On August 21, 2015, a federal Court of Appeals issued a unanimous opinion affirming the validity of the Final Rule. This opinion upholding the Home Care Final Rule became effective on October 13, 2015, when the Court of Appeals issued its mandate.
- The US DOL issued a statement on its website, stating that it would not begin enforcement of the Final Rule until November 12, 2015.
- **Since that time, however, a number of plaintiffs have successfully sued their home care agency employers, alleging that they should have received overtime pay under the Final Rule starting on January 1, 2015**.

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Claims Arising from Incorrect Calculations of Overtime

Basic Rules Regarding the Regular Rate

- The regular rate includes all remuneration paid to an employee, unless it falls within a statutory exclusion from the regular rate.
  - gifts made at holidays or other special occasions as a reward for service, which are not determined by or dependent on hours worked, production, or efficiency.
  - pay for expenses incurred on the employer's behalf,
  - true premium pay for work on Saturdays, Sundays, and holidays, or hours worked in excess of eight in a day,
  - discretionary bonuses,
  - payments for occasional periods when no work is available due to vacation, holiday, or illness,
  - pension and welfare contributions to a third party, and profit-sharing plan contributions.

Examples of Incorrect Regular Rate Calculations

- Failure to consider holiday premiums in determining the regular rate where the premium does not equal 1.5 times or more the regular rate of pay.
- Referral bonuses.
- “Misc.” cash payments.
- Wage parity benefits paid as cash.
- Travel time and in-service if paid at minimum wage, may require the agency to calculate the regular rate if the employee’s other work hours are paid at a rate higher than minimum wage.

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Settling Lawsuits

Desrosiers v. Perry Ellis Menswear LLC

- Several months ago, the New York Court of Appeals ruled that notice of case/lawsuit settlements must be sent to possible class members even if the class has not yet been certified.
- In *Perry Ellis*, the plaintiff brought a putative class action alleging that the defendant improperly classified employees as interns, and sought wages on his own behalf and on behalf of similarly situated individuals.
- After the parties agreed to a settlement on an individual, non-class basis, the defendant moved to dismiss the case. The plaintiff then filed a motion seeking leave to provide notice of the proposed dismissal to all putative class members.
- The motion was opposed by the defendant based on the argument that the plaintiff had not moved for class certification within the required time. The trial court denied the motion and dismissed the case. The Appellate Division reversed, and the Court of Appeals affirmed.
- The Court of Appeals' decision means that all putative class members in a case filed in a New York state court must receive notice of proposed dismissals, discontinuances, and compromises, whether or not a class has been certified. Such notice may not increase the cost of an individual settlement, but may increase the likelihood that an absent class member will seek to pursue an individual claim and/or the class claims that had been initiated by the settling named plaintiff.

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Government Audit Updates as Related to Wage and Hour

Government Agencies with Home Care Audit Focus

- NY Attorney General, Medicaid Fraud Unit
- NY Attorney General, Labor Bureau
- NY Office of Medicaid Inspector General
- NYC Department of Consumer Affairs
- New York Department of Labor

Government agencies are sharing information in conjunction with specific initiatives, such as wage parity compliance.

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Wage and Hour is Focus of Many Audits

- Common areas of focus:
  - Is overtime paid after 40 hours/week?
  - Is the overtime rate computed correctly?
  - Are aides paid weekly?
  - Are wage parity benefits adding up to $4.09/$3.22 per hour for employees?
  - Are Wage Notices provided to employees at the outset of employment?
  - Are aides paid for in-service and travel time?
  - Are home care owners benefiting from wage parity benefits, directly or indirectly?

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Information Commonly Requested in Audits

- All payroll records for a specific period of time
- All employee handbooks and policies
- All timesheets/EVV records
- All wage parity benefit plans and documents
- Proof that aides received $4.09/$3.22 per hour worked on eligible Medicaid cases
- Any communications to employees, explaining the slate of wage parity benefits
- All communications between agency owners/managers and any other party concerning wage parity benefits
- Bank statements, general ledgers

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New York City Safe & Sick Time Act

New Guidance Applicable to Domestic Workers

- The New York City Department of Consumer Affairs ("DCA") recently issued new guidance clarifying its interpretation and enforcement position concerning the Safe and Sick Time Act.
  - The term "domestic worker" does not include workers who are employed by an agency and provide services as an employee of that agency, regardless of whether they are jointly employed by an individual or private household in the provision of service. Thus, NYC-area employees of LHCSA HHAs and PCAs are not considered "domestic workers" and must receive safe and sick paid time off in accordance with the law. Under the Domestic Workers' Bill of Rights, domestic workers receive paid time off (including sick time) after one full year of employment, and they may be entitled to receive accrued but unused paid time off at the end of the year and upon termination of employment.
  - Employers must distribute written safe and sick leave policies personally when an employee begins employment with that employer, within 14 days of the effective date of any policy change, and upon employee request. An employer may not distribute the Notice of Employee Rights in lieu of distributing or posting its own written safe and sick leave policy.
  - The employer must use a delivery method that reasonably ensures that employees receive the written safe and sick leave policy. For example, an employer may provide this to each employee personally, by regular mail, by email or by delivery to the employee by including it in new hire materials if the employer gives those materials directly to the employee.
  - Employers are required to save a signed copy establishing the date that the written safe and sick leave policy was provided to an employee and proof that the notice was received by the employee.
  - An employer's safe and sick leave policy must describe the law's two-pronged confidentiality requirements. First, an employer cannot require employees or their health care or other service providers to disclose personal health information or the details of the matter for which an employee requests leave. Second, an employer must maintain the confidentiality of the information obtained, unless the employee consents in writing or the disclosure is required by law.
  - The policy must appear in a single writing.

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US DOL Proposal to Amend the "White Collar Exemptions"

Increasing Minimum Salary Levels

- The US DOL's proposed rule would raise the minimum salary levels for professional, executive and administrative employees to $679.00 per week ($35,308 annually).
  - Currently, to be exempt from minimum wage and overtime under the federal rules, employers are required to pay administrative, professional and executive employees at least $455 per week ($23,660 annually) on a salary basis.
  - In New York, however, the minimum salary level for **administrative** and **executive** employees is $1,125/week for large New York City employers, $1,012.50/week for small New York City employers, $900/week for employers in Long Island and in Westchester, and $832/week for employers in the rest of the State.
  - There is no minimum salary requirement for "professional" employees under New York law. Thus, the proposed US DOL rule, if adopted, would require employers in New York State to pay employees who are classified as exempt solely under the "professional" exemption, a salary of at least $670/week, paid on a salary basis, to preserve those employees' exempt status.

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Satisfying Minimum Salary Requirements Through Incentive

- Under the proposed rule, employers would be able to satisfy up to 10% of the minimum salary requirements through non-discretionary bonuses and commission payments.
  - The current regulations do not permit this.
- To take advantage of this 10% rule, the additional compensation must be paid annually or less frequently.
- An employer is also permitted to make a “catch-up” payment following the end of a year in order to satisfy the minimum salary requirements for an exempt employee. The catch-up payment, however, must be made no later than the next pay period after the end of the year.

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Misclassification Claims by Coordinators

There has bene an Uptick in Claims by Coordinators

- Claims by coordinators for unpaid overtime are becoming more frequent.
- Generally, coordinators are classified by home care agencies as exempt from overtime.

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Administrative Exemption

- To qualify for the administrative exemption, the following tests must be met:
  - The employee is compensated on a salary basis, with minimum weekly salary amounts presently being $1,125 for “large” NYC employers, $1012.50 for “small” NYC employers, $900 for Nassau, Suffolk and Westchester employers, and $832 for employers in the rest of the State.
  - The employee’s primary duty is the performance of office or non-manual work that is directly related to the management or general business operations of the employer or the employer’s customers; and
  - The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

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On-Call Time Performed by Coordinators who are Non-Exempt

- Coordinators who are non-exempt must be paid for overtime, but agencies frequently fail to account for on-call time in determining whether the employee worked overtime in the week that the coordinator also did on-call duties and, secondly, the correct overtime rate.

On-Call Rules

- An employee who is required to remain on call on the employer's premises or so close to the premises that the employee cannot use the time effectively for his or her own purpose is considered to be working while on-call.
- An employee who is required to carry a cell phone, or a beeper, or who is allowed to leave a message where he or she can be reached is not working (in most cases) while on-call. However, imposing additional constraints on the employee's freedom could require this time to be compensated.

Determining the Regular Rate

- Employers must pay all **non-exempt** employees time and one-half of their "**regular rate of pay**" for each hour worked in excess of 40 in a workweek.
- The "regular rate" of pay is usually calculated by dividing the total pay (except for those payments expressly excluded) in any workweek by the total number of hours actually worked in that workweek.
- The regular rate includes all remuneration paid to an employee, unless it falls within a statutory exclusion from the regular rate.
- A per-diem rate paid to coordinators who work on-call must be considered in determining the regular rate.

Recommendations

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- Ensure that all office employees are properly classified as exempt or non-exempt.
- All non-exempt employees must keep accurate and complete records of work time.
- Conduct periodic true-up/self-audits of wage parity compliance.
- Ensure that all current staff have signed mandatory arbitration agreements with class action waivers, including coordinators

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Questions?

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