

The Hidden Wage & Hour Traps in Home Care: How Agencies Are Accidentally Creating Million-Dollar Liability

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Overview of Today's Presentation

- What's the reason that home care is such a large target for wage and hour litigation
- Exposure demonstration (math!)
- Nondiscretionary bonus programs and implications for OT (retention bonuses, recruitment bonuses, rewards programs)
- Remote work exposure for wage claims
- Immigration and OIG/OMIG-related issues
- Joint employment problems
- Risk mitigation strategies



Why are Wage and Hour Claims so Expensive

- Six year statute of limitations (“SOL”)
 - There is a toll or freeze on the 6 year SOL if a claim is filed
 - The claim/liability goes forward up until the day of settlement
- Liquidated damages
- Interest on unpaid claims 9%
- Large workforce
- Damages for late wages
- Many “gotcha” opportunities for claims in home care wage regulations

Liability Damages Calculation

Example: 1 aide works 3 live-ins per week for 25 weeks in a year, for 3 years (2025, 2024, 2023). No spread of hours paid. No in-service paid. No travel time paid. No call-in pay.

2025 MW = \$19.10, so for OT (32 hours x \$28.65 x 25 weeks = \$22,920) + for SOH (3 SOH at \$19.10 x 25 weeks = \$1,432.50) + for in-service (12 hours of inservice x \$19.10 = \$229.20) =

TOTAL \$24,581.7

2024 MW = \$18.55, so for OT (32 hours x 25 weeks x \$27.83 = \$22,264) + (3 SOH at \$18.55 for 25 weeks = \$1,391.25) + for in-service (12 hours of inservice x \$18.55 = 22.6

TOTAL: \$23, 877.85

2023 MW = \$17.00, so 32 for OT (32 hours x \$25.50 x 25 weeks x) + for SOH (3 SOH at \$17 x 25 weeks = \$1,275) + for in-service (12 hours of inservice x \$17 = \$204)

TOTAL: \$21,879

3 year total is: \$24,581.7 + \$23, 877.85 + \$21,879 = \$70,338.55 (with interest at 9%, \$6,330.47

With liquidated damages: \$140,677.1

By default, the claimants will seek wage parity for every hour of unpaid time! So \$4.09 for NYC (or \$2.54/hour starting with 2025 hours). So, for 2023 and 2024 (40 weeks x 1 hours x \$4.09) and for 2025, 25 weeks x 1 hour per week): \$227.1 (one hour, the 40th hour, since the rest of the time is OT, WP does not apply to OT).

Wrong LS62 and Wrong Pay Statements: \$10,000 per aide

TOTAL FOR ONE AIDE, for 3 years, where she worked 3 live-in shifts: **\$157,234.67**



Medicaid and Healthcare Personnel Requirements



OMIG Audit Protocols and False Claims Act

- Wage parity – new forms, new claims/certifications = heightened exposure
- Workers not authorized to work in the US
 - E-Verify?
- OMIG audit protocols.
 - Examples (under PCA protocols):
 - A supervising nurse must conduct an orientation visit in the patient's home with the aide present for the initial authorization of personal care services. The orientation visit must be conducted within 7 calendar days of the aide being assigned to the case.
 - If payment was made for services performed by the patient's spouse, parent, son, son-in-law, daughter or daughter-in-law, the claim will be disallowed.
 - Examples (under NHTD protocols):
 - The provider record will be reviewed to determine if the provider or its contractor has documentation of a background check for employees hired on or after 9/1/2006 and provided appropriate monitoring of the aide while waiting for the results of the background check. If the criminal history check requirement has not been documented, the paid claim will be disallowed.



Remote Work and Compensability for Time for Non-Exempt Employees



When does the compensable workday start and end for remote employees?

- Background:

- As of June 1946, the U.S. Supreme Court had ruled that compensable activities under the Fair Labor Standards Act included all physical or mental exertion required by an employer and pursued for the benefit of its business.
- Pursuant to the Portal-to-Portal Act, “activities ... preliminary ... or postliminary to [an employee’s] principal ... activities” are **not** compensable. On the other hand, if the activity is both *integral and indispensable* to the performance of the employee’s principal activities, then it is compensable time.



When does the compensable workday start and end for remote employees?

- In 2025, a group of employees who worked from home filed suit in a federal court in Ohio, seeking pay under the FLSA and Ohio wage-hour law for time spent “booting up and logging into their computers” at the start of the day, booting up and logging in after their meal breaks and shutting down their computer at the end of the day.
- The employees’ principal activities were to field calls from medical patients, responding to their needs or directing them to the appropriate medical departments. This required that the employees access certain computer programs and applications.



The Court's Findings:

- The Court found that the following activities were “preliminary or postliminary, and therefore noncompensable under the FLSA”:
 - [T]urning on or waking up the computer; entering a username and password to access the computer; dual authenticating . . . ; opening the timekeeping system, accessing a VPN, on the front end; and shutting down the computer, locking the screen, or putting it in sleep mode, on the back end.
 - According to the Judge, “While all those activities may in some sense be indispensable, they are not integral to the employees’ principal duties of answering inbound calls.”
- On the other hand, the Judge found that:
 - the time spent opening and operating work applications in connection with handling calls was “integral and indispensable” and therefore compensable: “These include accessing Defendants’ phone system, workflow system, directory database, or a client’s [electronic medical record] system.”
- The judge found that the workday for the employees began when they accessed a program or application in the latter category and ended when they closed out of the last one. Based on these findings, Judge Cole granted the employer’s motion for summary judgment as it related to startup time, but denied it as it related to “program and application” time.



Overtime Calculations



When Should Bonuses be Included in OT Calculations?

- Section 7 of the FLSA requires employers to pay nonexempt employees an overtime rate of at least 1.5 times their regular rate of pay for each hour worked over 40 hours in a workweek. 29 U.S.C. § 207(a)(1). Whether bonuses must be included in an employee's "regular rate" for purposes of calculating the amount of overtime due depends on what type of bonus is paid. Some bonuses are statutorily exempt and, thus, do not need to be included in an employee's regular rate, while others are not. One common statutory exemption is a discretionary bonus. 29 U.S.C. § 207(e)(3).
- To qualify as a discretionary bonus, all three of the following conditions must be met under the FLSA:
 - Both the fact and amount of the payment are determined at the sole discretion of the employer;
 - The employer makes that determination at or near the end of the period in which the employee's work is performed; and
 - The payment is not made pursuant to any prior contract, agreement, or promise that would cause the employee to expect such payments regularly.
- **If any of these conditions are not met, the bonus is nondiscretionary and must be included in the regular rate.**



Opinion Letter of Wage and Hour Division

- In Opinion Letter FLSA2026-2, issued under the Trump Wage and Hour Division of the US DOL, the issue involved an employer that implemented a bonus plan under which drivers could earn a set bonus amount based on punctuality, attendance, and completion of daily safety tasks.
- Two of the three criteria for a discretionary bonus were not satisfied: (1) the employer announced the bonus plan well in advance of the period in which the employee's work is performed, and (2) both the fact and amount of the bonus were determined before the end of the work period.
- As such, the DOL determined that this was nondiscretionary and had to be included in the drivers' regular rate.

Calculating the Correct Total Comp with a Nondiscretionary Bonus

Below is an example adapted from Opinion Letter FLSA2026-2 to demonstrate how nondiscretionary bonuses should be calculated into the regular rate and overtime rate. Assume an employee:

- Has a base hourly rate of **\$12**;
 - Works **50 hours** in a single workweek (*i.e.*, 10 overtime hours); and
 - Under a predetermined incentive plan, earns an additional **\$5.60 per hour** as a nondiscretionary bonus for all hours worked that week.
- **So the Calculation would be:**
 - **Hours and rates**
 - Base hourly rate: **\$12**
 - Nondiscretionary bonus rate: **\$5.60** per hour
 - Total hours worked: **50** (40-hour workweek + 10 overtime hours)
 - **Straight-time earnings (all 50 hours)**
 - Base pay: total hours × base hour rate = $50 \times \$12 = \$600$
 - Bonus pay: total hours × nondiscretionary bonus rate = $50 \times \$5.60 = \$280$
 - Total straight-time earnings: base pay + bonus pay = $\$600.00 + \$280.00 = \$880$
 - **Regular rate**
 - Regular rate = total straight-time earnings ÷ total hours = $\$880 \div 50 \text{ hours} = \$17.60 \text{ per hour}$
 - **Overtime:**
 - Half-time rate: (regular rate) × 0.5 = $\$17.60 \times 0.5 = \$8.80 \text{ per overtime hour}$
 - Overtime: overtime hours × half-time rate = $10 \times \$8.80 = \$88$
 - **Total pay for the week**
 - Total pay for the week = straight time + overtime = $\$880 \text{ (straight time)} + \$88 \text{ (overtime)} = \$968$



Exempt and NonExempt from OT Questions



Can a Social Worker be Non-Exempt from OT?

- The DOL addressed whether a licensed clinical social worker (LCSW) who lost supervisory duties could still qualify for the learned professional exemption and whether employers must classify qualifying employees as exempt. In this case, an LCSW employed by a healthcare organization since 2018 was reclassified from exempt to nonexempt after an internal restructuring eliminated the employee's supervisory responsibilities and converted her to an hourly rate. The employee continued to perform her LCSW clinical duties, including assessments, treatment planning and crisis intervention – all requiring the consistent exercise of professional discretion and judgment and requiring a specialized advanced degree.
- The DOL concluded that the loss of supervisory responsibilities alone would not disqualify the LCSW from the learned professional exemption, as her primary duties still involved work requiring advanced knowledge in a field of learning. The DOL noted that social workers with master's degrees, working in their field, typically meet the duties requirements for the professional exemption. **But the change from salary to hourly pay likely defeats the exemption because, with a few exceptions, learned professionals must be paid on a salary basis.**
- Importantly, the DOL emphasized that even when employees meet all criteria for an exemption, employers retain complete discretion to classify them as nonexempt.
- **The FLSA prohibits misclassifying nonexempt employees as exempt but does not require employers to claim exemptions for qualifying employees. Employers may wish to classify an otherwise exempt employee as nonexempt to have more control over the employee's pay, particularly if the employee works irregular hours. If the employee is exempt, the employer must pay the employee the same weekly salary even if the employee works few hours because of a lack of work.**



Joint Employment



Joint Employment under the FLSA

- On April 22, 2026, the United States Department of Labor's Wage and Hour Division (Department) announced a Notice of Proposed Rulemaking addressing the determination of joint employer status under the Fair Labor Standards Act, the Family and Medical Leave Act, and the Migrant and Seasonal Agricultural Worker Protection Act.
- Comments on the Proposed Rule must be received by June 22, 2026.



Background

- When a joint employment relationship exists, those employers are jointly and severally liable for any wages, damages, and other relief owed to employees, including payment for all hours the employee worked for all joint employers and all overtime premiums due for that time.
- Historically, the Department had provided guidance to make that determination under federal law, but it has not done so in recent years. As a result, joint employer determinations have continued to be addressed through existing judicial frameworks, particularly in “vertical” scenarios in which multiple entities simultaneously benefit from the same work performed by one or more workers.



Vertical vs. Horizontal Joint Employment

- The Proposed Rule distinguishes between two scenarios of joint employment: “vertical” and “horizontal.”
- This is a distinction that courts and the Department have long drawn.
- Vertical joint employment arises when an employee is jointly employed by two or more employers that simultaneously benefit from the employee’s work, such as staffing agencies and their clients or contractors and subcontractors.
- Horizontal joint employment occurs when an employee works separate hours for two or more employers in the same workweek and the employers are sufficiently associated with each other with respect to the individual’s employment.



Vertical Joint Employment

- For vertical joint employment, the Proposed Rule adopts a four-factor analysis examining whether the potential joint employer:
 - Hires or fires the employee,
 - Supervises and controls the employee's work schedule or conditions of employment to a substantial degree,
 - Determines the employee's rate and method of payment, and
 - Maintains the employee's employment records.
- If those 4 factors were to unanimously point in a single direction, there would be a "substantial likelihood" of joint employment. Additional factors may be relevant but generally carry less weight.
- Notably, unlike the prior rule, the Proposed Rule does not require actual exercise of control; reserved control may be considered, though it is deemed less indicative of joint employment than exercised control.



Horizontal Joint Employment

- For horizontal joint employment, the Proposed Rule largely re-adopts the longstanding previous standard:
 - If employers are sufficiently associated with respect to the employment of the employee, they are joint employers.
 - Business relationships that have little to do with the employment of specific employees, such as sharing a vendor or being franchisees of the same franchisor, are alone insufficient to establish horizontal joint employment.



Implications

- The Proposed Rule has significant implications for any business that relies on third-party labor arrangements.
- Companies that contract with staffing agencies for workers - an arrangement common in many industries, including healthcare, logistics, and manufacturing - would need to carefully evaluate how the four-factor vertical joint employment analysis applies to those relationships.
- Similarly, businesses that use subcontractors are encouraged to assess whether the degree of control they exercise - or reserve the right to exercise - over subcontractor employees could give rise to joint employer status under the Proposed Rule.



Employee or Contractor?



The Regulatory Background Back-and-Forth

- The U.S. Department of Labor's (DOL) Wage and Hour division announced on February 27, 2026, a proposed rule to determine whether a worker should be classified as an employee or independent contractor under the FLSA.
- The proposed rule brings back a rule introduced in 2021 during President Donald Trump's prior term. The Biden administration rescinded the 2021 rule in favor of its own rule, which became final in 2024. The DOL stopped enforcing the Biden rule, however, when Trump took office, and has now proposed reincarnating its 2021 rule.
- The 2024 rule (under Biden) applied a six-factor totality-of-the-circumstances test to determine whether a worker should be classified as an employee or independent contractor. The six factors, **given equal weight**, were
 - (1) the opportunity for profit or loss,
 - (2) investments by the workers and the potential employer,
 - (3) degree of permanence of the work relationship,
 - (4) nature and degree of control,
 - (5) extent to which the work performed is an integral part of the potential employer's business, and
 - (6) skill and initiative.



What's the Proposed Rule?

- The proposed rule, substantively identical to the 2021 rule, replaces the equally weighted six-factor test **with a focus on two “core factors” to assess the “economic reality” of the working relationship.**
- These two factors are (1) the nature and degree of control over the work and (2) the worker's opportunity for profit or loss based on initiative and investment.
- Other factors, such as the amount of skill required for the work, the permanence of the working relationship, and whether the work is part of an integrated unit of production, are also considered, but given less weight than the core factors of the economic reality test.
- The proposed rule will also consider the reality of the working relationship over theoretical possibilities, regardless of what any written agreement might say about the relationship.
- So, companies should not rely on written agreements alone as proof of proper classification, and should seek to ensure that the reality of their relationship with workers matches what the written agreement purports to describe.



Big Picture Risk Mitigation Strategies

- Arbitration agreements with class action waivers
 - But not binding on regulators (e.g., DOL)
- Automate compliance- really no excuse at this point with the technology being what it is, and the lessons learned from litigation
- Stay on top of legal developments
 - Turnover with government regulators, just like with legal changes. Must continue to review and revise documents (onboarding) and legal documents
- Invest in relationships with local legislators
- Invest PR and business development



Questions?

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