

HOT WAGE AND HOUR ISSUES FOR HOME HEALTHCARE EMPLOYERS

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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I. SPOTLIGHT ON WAGE-AND-HOUR RISKS FOR THE HOME HEALTHCARE INDUSTRY

Class and collective actions against healthcare employers under the Fair Labor Standards Act (FLSA), the federal wage and hour law, have increased dramatically in recent years, and providers of home healthcare services have not been immune. Plaintiffs' attorneys recently filed class action lawsuits against two of the nation's largest home healthcare providers alleging that clinicians, including registered nurses, physical therapists, and occupational therapists, were improperly classified as exempt employees and incorrectly compensated under the FLSA and state law.¹ Other class actions have been filed in various states, accusing home healthcare providers of FLSA violations such as failing to pay for overtime, work during meal periods, off-the-clock work, and travel time.²

The U.S. Department of Labor (DOL) has also specifically targeted the home healthcare industry in its "We Can Help" campaign, designed to educate workers about their rights and how to file a complaint with the DOL for wages allegedly owed. In its press release announcing the campaign, the DOL stated that it is placing "a special focus on reaching employees" in home healthcare and other traditionally lower-wage industries.³ In addition, the DOL has disseminated a number of fact sheets specifically addressed to healthcare workers, which has led inevitably to more investigations and lawsuits.⁴

In addition to its educational outreach efforts, the DOL has increased its enforcement activities in the home healthcare industry. For example, following an investigation of a provider of home healthcare aides, the DOL filed a lawsuit in federal court alleging that the provider's practice of paying the aides flat daily rates violated the FLSA because it failed to provide them minimum wages and overtime.⁵ The court recently ordered the provider to pay back wages and liquidated damages to the home healthcare aides. Similar enforcement actions⁶ by the DOL have targeted the alleged failure to pay in-home caregivers for travel time between work sites, incorrect calculations of the overtime rate, child labor violations, and misclassification of employees as independent contractors.

Local offices of the DOL in several states—including New York, Rhode Island, and Connecticut—have also rolled out initiatives to increase their enforcement of wage-and-hour laws against healthcare providers. On February 22, 2010, the Albany, New York District Office announced that it was conducting investigations in the healthcare industry and stated that in investigations conducted in the prior five years, it had found that less than 36 percent of healthcare employers were in compliance with the FLSA, with more than \$2 million in back wages due.⁷ This message came on the heels of a November 17, 2009 announcement that the Hartford, Connecticut District Office was conducting a compliance initiative in the residential healthcare industry in Connecticut and Rhode Island due to perceived common violations in the industry, including failure to pay for all hours of work, failure to properly calculate the regular rate, and failure to properly classify employees.⁸

II. POTENTIAL LOSS OF THE COMPANIONSHIP SERVICES EXEMPTION

The DOL's proposed rule to limit the companionship services exemption from the FLSA's minimum wage and overtime requirements and deny the exemption to third-party employers would have a major impact on home healthcare providers. Home care agencies that provide in-home caregivers to individuals and families would be adversely affected by such a change. Since 1974, employees "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for

1 *Cook v. Amedisys, Inc.*, Case No. 3:12-cv-01082 (D. Conn. July 25, 2012); *Rindfleisch v. Gentiva Health Services, Inc.*, Case No. 1:10-cv-03288 (N.D. Ga. May 10, 2010).

2 See, e.g., *Brooks v. Watson Home Health Care, Inc.*, Case No. 2:12-cv-13599-GCS-RSW (E.D. Mich. Aug. 14, 2012); *Wilk v. VIP Health Care Services, Inc.*, Case No. 10 Civ. 5530 (ILG) (JMA) (E.D.N.Y. Nov. 30, 2010); *Correa v. Gelhomecare, Inc.*, Case No. 11-80003-CIV-MARRA (S.D. Fla. Jan. 3, 2011).

3 Wage and Hour Division, News Release No. 10-0411-NAT (Apr. 1, 2010) (<http://www.dol.gov/opa/media/press/whd/WHD20100411.htm>)

4 *Health Care Industry and Hours Worked*, <http://www.dol.gov/whd/regs/compliance/whdfs3.htm>; *Health Care Industry and Calculating Overtime Pay*, <http://www.dol.gov/whd/regs/compliance/whdfs4.htm>; *Home Health Care Industry*, <http://www.dol.gov/whd/regs/compliance/whdfs25.htm>.

5 Wage and Hour Division, Press Release No. 12-45-ATL (017) (Jan. 23, 2012), available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20120123.xml>.

6 See, e.g., Wage and Hour Division, Press Release No. 12-1578-CHI (Aug. 13, 2012), available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Midwest/20120813.xml>; Press Release No. 11-1737-CHI (Dec. 28, 2011), available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Midwest/20111228.xml>; Press Release No. 11-377-DAL (Mar. 30, 2011), available at (<http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20110330.xml>).

7 Wage and Hour Division, Press Release No. 10-159-NEW / BOS 2010-079 (Feb. 22, 2010), available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Northeast/20100222.xml>.

8 Wage and Hour Division, Press Release No. 09-1379-BOS / BOS 2009-391 (Nov. 17, 2009), available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Northeast/20091117.xml>.

themselves,”⁹ as well as those “employed in domestic service in a household and who reside[] in such household”¹⁰ have been excluded from coverage under the FLSA. Many courts have concluded that the “companionship services” exemption applies to home care workers and, thus, have found that the FLSA’s minimum wage and overtime requirements do not apply to them.¹¹

A new proposed rule published by the DOL on December 27, 2011¹² threatens to erase the exemption for approximately 1.8 million domestic caregivers, making them eligible for minimum wage and overtime payment. The DOL reasoned that, given the substantial growth and transformation of the in-home care industry, the current exemption is too broad and applies to professional workers that Congress did not intend to exclude from the FLSA’s coverage.¹³

Accordingly, the DOL’s proposed rule changes the companionship exemption to narrowly define the types of tasks that may be performed by exempt companions, and limits the exemption only to companions employed directly by the individual, family or household using the services. Specifically, the proposed regulation:

1. Limits the companionship exemption to those who provide “fellowship and protection,” which include activities such as playing cards, visiting with friends, taking walks, or engaging in hobbies. Personal care services like dressing, grooming, and driving to appointments must be incidental to the fellowship and protection duties and must not exceed 20 percent of the total hours worked;¹⁴ and
2. Entirely prohibits the use of the exemption by third-party employers, such as home healthcare agencies, which would be required to provide minimum wage and overtime pay to home healthcare employees.¹⁵

The DOL has twice extended the comment period, and most recently set the deadline for submission of comments to March 21, 2012. Issuance of the final rule is anticipated to occur in April 2013.

The current regulation defines “companionship services” to include “household work related to the care of the [patient],” but excludes “services related to the care and protection of the [patient] which require and are performed by trained personnel, such as a registered or practical nurse.”¹⁶ The regulation also provides that exempt employees may perform general household work, “[p]rovided, however, [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.”¹⁷

The question of what qualifies as “general household work” was at issue in *Anglin v. Maxim Healthcare Services, Inc.*,¹⁸ a case in which the plaintiff, a certified nursing assistant who worked at Maxim as a “Certified Home Health Aide,” argued that because she spent more than 20 percent of her time performing general housework and other work unrelated to patient treatment, she did not qualify for the exemption and should have been paid overtime for hours worked over 40 in a workweek.¹⁹ She testified that, in addition to the work she performed for her patients, she performed other work for the household unrelated to patient care, including shopping, washing laundry, and cleaning for the entire household.²⁰ The court denied summary judgment to the employer, which argued that the plaintiff was exempt from overtime under the healthcare companion exemption and was not entitled to overtime compensation under the FLSA. In making its decision, the court held that there were genuine issues of material fact as to the amount and extent of the “general household tasks” performed by the plaintiff. Following a bench trial, the court ultimately found that the plaintiff had not provided sufficient, credible testimony to support her claim that

9 29 U.S.C. § 213(a)(15); *see also* 29 C.F.R. § 552.6.

10 29 U.S.C. § 213(b)(21); *see also* 29 C.F.R. § 552.3.

11 *See, e.g., Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007); *Buckner v. Florida Habilitation Network, Inc.*, 489 F.3d 1151, 1153 (11th Cir. 2007); *Cox v. Acme Health Services, Inc.*, 55 F.3d 1304, 1311 (7th Cir. 1995); *see also McCune v. Oregon Senior Services Div.*, 894 F.2d 1107, 1109-10 (9th Cir. 1990); *Toth v. Green River Regional Mental Health/Mental Retardation Board, Inc.*, 753 F. Supp. 216, 217-18 (W.D. Ky. 1989); *Sandt v. Holden*, 698 F. Supp. 64, 67-68 (M.D. Pa. 1988).

12 Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 248 (published Dec. 27, 2011) (to be codified at 29 C.F.R. § 552).

13 *Id.* at 81192.

14 *Id.* at 81193-94.

15 *Id.* at 81198.

16 29 C.F.R. § 552.6.

17 *Id.*

18 *Anglin v. Maxim Healthcare Services, Inc.*, 2009 U.S. Dist. LEXIS 70155, at *24 (M.D. Fla. July 22, 2009) (denying summary judgment for defendant employer on companionship exemption), *magistrate’s recommendations adopted by*, 2009 U.S. Dist. LEXIS 70274, at *1 (M.D. Fla. Aug. 11, 2009).

19 *Anglin*, 2009 U.S. Dist. LEXIS 70155, at *2.

20 *Id.* at *14.

she spent more than 20 percent of her time performing general household activities.²¹ This result, however, came only after expensive and time-consuming litigation.

In October 2012, Maxim Healthcare Services, Inc. was sued by another Home Health Aide alleging that Maxim violated federal and state wage and hour laws when it did not pay her overtime for work performed in excess of 40 hours in a workweek.²² As in *Anglin*, the plaintiff in the new case alleged that she did not qualify for the companionship exemption arguing that she spent the majority of her time performing general housekeeping duties as opposed to patient care.²³ These cases, and other examples of serial litigation against the same employer regarding the same wage and hour issues, highlight the importance of implementing practices that will allow for early dismissal of cases, without the need for lengthy discovery, and discourage the filing of subsequent cases on the same issues. For example, employers may implement a timesheet that requires employees classified as exempt under the companionship exemption to identify the type of work completed each week as a means of establishing the percentage of their work time spent on general household activities.

III. OTHER COMMON TYPES OF CLAIMS

Lawsuits against home healthcare providers have frequently involved: (1) employees who claim they have been misclassified as exempt and are, therefore, owed overtime or other compensation; (2) non-exempt employees who claim they have not been paid for all time worked; and (3) independent contractors who claim they are actually employees and must be compensated accordingly.

A. Misclassification as Exempt from the FLSA

To be classified as exempt under the FLSA, employees must satisfy *both* the duties and compensation requirements of the applicable exemption. Generally, courts have found that home healthcare employees such as registered nurses, physical therapists, occupational therapists, medical social workers and others with similar duties satisfy the duties requirements of one or more of the exemptions discussed below. However, some courts have found that certain pay practices utilized in the home healthcare industry have defeated the exemption, even when the duties test has been satisfied.

1. The Professional Exemption—Duties Requirements

Under the duties requirement of the learned professional exemption, an employee's primary job duty must involve: (1) work requiring advanced knowledge; (2) in a field of science or learning; and (3) that must be customarily acquired by a prolonged course of specialized intellectual instruction.²⁴ Under the DOL regulations, medicine is enumerated as a "field of science or learning,"²⁵ and the possession of an academic degree is *prima facie* evidence of specialized instruction.²⁶

The regulations also specify categories of occupations that generally satisfy the duties requirements of the professional exemption, as long as they meet the requisite degree or license requirements enumerated in the applicable regulations.²⁷ These include registered or certified medical technologists,²⁸ registered nurses,²⁹ and physician assistants,³⁰ and specifically exclude licensed practical nurses and "other similar health care employees."³¹ Nurse practitioners are likely to meet the duties requirement under the FLSA because they have higher levels of education and generally have more actual medical responsibility than registered nurses. Depending on their duties, certified nursing assistants, however, may not meet the requirement because they often perform functions similar to licensed practical nurses.

Irrespective of degree or title, however, all employees considered exempt must meet the duties requirements enumerated in the specific regulation. For registered or certified medical technologists, this means that they must complete three years of pre-professional study

21 *Anglin v. Maxim Healthcare Servs., Inc.*, Case No. 6:08-cv-689-Orl-22DAB (M.D. Fla. Jan. 25, 2010) (Memorandum Decision and Order).

22 *Lawrence v. Maxim Healthcare Services, Inc.*, Case No. 1:12-cv-02600-CAB (N.D. Ohio Oct. 17, 2012) (Complaint).

23 *Id.*

24 29 C.F.R. §§ 541.301(a)(1)-(3).

25 29 C.F.R. § 541.301(c).

26 29 C.F.R. § 541.301(d).

27 29 C.F.R. § 541.301(e).

28 29 C.F.R. § 541.301(e)(1).

29 29 C.F.R. § 541.301(e)(2).

30 29 C.F.R. § 541.301(e)(4); *see also* *Cuttic v. Crozer-Chester Med. Ctr.*, 760 F. Supp. 2d 513 (E.D. Pa. 2011) (holding that physician assistants also do not qualify as exempt under the medical exemption, 29 C.F.R. 541.304).

31 29 C.F.R. § 541.301(e)(2).

at an accredited college or university plus a fourth year of professional course work at a school of medical technology approved by the Council of Medical Education.³² Registered nurses must be registered by the appropriate state examining board,³³ and physician assistants must have graduated from an accredited physician assistant program and be certified by the National Commission on Certification of Physician Assistants.³⁴

Having the requisite degree or license may not be enough to satisfy the learned professional exemption.³⁵ The employee's *primary* duty must involve specific work that requires advanced knowledge.³⁶ "Critical to the applicability of the professional exemption are considerations of what activities a nurse engages in, whether such work requires advanced knowledge in a field of science or learning, what guidelines or tools a nurse employs, how often she consults them, and in what manner she does so."³⁷

Although courts have generally found that nurses satisfy the duties test for the professional exemption,³⁸ nurses performing non-traditional nursing duties, such as case-management functions, have nevertheless challenged their exempt classification.³⁹ For instance, in *Powell v. American Red Cross*,⁴⁰ a registered nurse who was a "Wellness Associate" (also called an Occupational Health Nurse) challenged her classification as an exempt professional. As a Wellness Associate, the plaintiff spent most of her time on matters relating to the deployment of Red Cross Armed Forces Emergency Services personnel overseas, focusing on the medical aspects of the deployment process, including collecting and reviewing medical records to determine whether the individuals being deployed met the medical requirements for deployment under the applicable military guidelines. The plaintiff also consulted on medical issues that arose while personnel were overseas. In addition to these duties, the plaintiff's job responsibilities included providing first aid for injured employees; filing worker's compensation claims; performing ergonomic assessments; health education and counseling; blood pressure monitoring; cleaning the resting/sleeping and lactation rooms and tracking usage of those rooms; stocking the first aid boxes located throughout the Red Cross national headquarters; ordering and stocking office and medical supplies; dispensing educational materials; and managing files.⁴¹ Although the plaintiff's work included some routine administrative tasks, the court ultimately concluded her responsibilities satisfied the professional exemption, finding that the medical duties she performed in determining whether personnel met the medical requirements for deployment and addressing their health issues were of principal importance, even if they occupied less than 50 percent of her workdays.

More recently, in *Rieve v. Coventry Health Care, Inc.*,⁴² registered nurses employed as Field Case Managers (FCMs) for a company that provided workers' compensation medical and case management services to insurers and employers challenged their professional exemption classification. The nurses' job duties were "provid[ing] ongoing, day-to-day case management services for Defendants' customers by documenting the costs of care, preparing reports regarding a plan of care, and identifying and implementing medical services to meet the needs of Defendants' customers."⁴³ Although they were not engaged in direct patient care, the nurses monitored and reported whether patients received medical care according to physician orders. The named plaintiff testified that she "spent more than fifty percent of her time communicating with doctors, patients and claims adjustors in order to understand the patients' conditions, determine what medical care was being provided and evaluate whether it was appropriate."⁴⁴ Moreover, the company's Field Case Manager Manual provided that the FCMs' duties involved "a skilled professional's critical evaluation of a claimant's medical progress followed by case management actions that

32 29 C.F.R. § 541.301(e)(1).

33 29 C.F.R. § 541.301(e)(2).

34 29 C.F.R. § 541.301(e)(4).

35 See, e.g., *Rieve v. Coventry Health Care, Inc.*, 2012 U.S. Dist. LEXIS 58603 (C.D. Cal. Apr. 25, 2012) (noting that the FLSA exemption inquiry does not end merely because the employee has an RN degree).

36 *Id.* at *14.

37 *Ruggles v. Wellpoint, Inc.*, 272 F.R.D. 320, 339 (N.D.N.Y. 2011) (citing 29 C.F.R. §§ 541.301(a), 541.704.)

38 *Rieve*, 2012 U.S. Dist. LEXIS 58603, at *19 (C.D. Cal. Apr. 25, 2012) ("This Court is not aware of any case, nor do Plaintiffs cite to any case, in which a case manager or a registered nurse in any position has not been deemed a professional exempt from FLSA coverage.").

39 See, e.g., *Rieve*, 2012 U.S. Dist. LEXIS 58603 (field case managers); 841 F. Supp. 2d 972 (S.D. W. Va. 2012) (utilization review nurse); *Powell v. Am. Red Cross*, 518 F. Supp. 2d 24, 30 (D.D.C. 2007) (Wellness Associate, also known as an Occupational Health Nurse).

40 518 F. Supp. 2d 24, 40 (D.D.C. 2007).

41 *Id.* at 28.

42 2012 U.S. Dist. LEXIS 58603 (C.D. Cal. Apr. 25, 2012).

43 *Id.* at *6.

44 *Id.* at *7.

facilitate recovery.”⁴⁵ Based on the facts of the case, the court upheld the exemption, finding that the nurses’ primary job duties required the application of advanced knowledge, judgment, and discretion. Healthcare providers should keep in mind, however, that there are differences between the assessment of the job duties for exemptions under the FLSA and the laws of some states. For instance, the California state regulations define exempt work slightly differently than the FLSA.⁴⁶

To decrease the risk of misclassifying home healthcare employees as exempt professionals based on the duties they perform, employers should avoid the assumption that the possession of a degree or professional certification automatically qualifies an employee for the professional exemption; rather, employers must consider the actual job duties of the employee. In addition, to the extent possible, employers should limit the percentage of non-exempt work done by exempt employees and ensure that job descriptions and company manuals accurately reflect the exempt duties performed by such employees. Employers also should use tools such as annual self-assessments to confirm the performance of exempt activities with the employees own accounts of their duties and responsibilities. Finally, audits of job duties by counsel can assist with properly determining employee classifications and also may provide a good faith defense to limit damages available under the FLSA in the event of litigation. These same risk-minimizing methods can be used to limit the risk of employees classified under the companionship exemption claiming that they do not qualify for the exemption based on excessive general household work. Employers should also consider requiring employees subject to the companionship exemption to report the percentage of time spent on direct patient care versus general household work each work day.

2. Other Exemptions—Duties Requirements

Other exemptions may also be available to home healthcare employees. For example, in *Goff v. Bayada Nurses, Inc.*,⁴⁷ the court found that a staff supervisor/on-call supervisor for a home healthcare agency satisfied both the executive and administrative exemptions under the FLSA and New Jersey Wage and Hour Law.⁴⁸ To satisfy the duties test of the executive exemption under the FLSA, an employee must:

1. have management of the enterprise or of a customarily recognized department or subdivision as his/her primary duty;
2. customarily and regularly direct the work of two or more other employees; and
3. have the authority to hire or fire other employees, or have his/her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees given particular weight.⁴⁹

In *Bayada Nurses*, the court concluded that, based on her deposition testimony, resume, and self-evaluations, the supervisor’s primary duty was management, which included overseeing all caseload management activity, direct responsibility for a caseload of approximately 25 clients, scheduling appropriate field staff, and assuring that the agency’s employees “retained a positive relationship with the client and/or family while adhering to standards.”⁵⁰ She regularly directed at least two staff members, was involved in interviewing and selecting employees, handling employee complaints and grievances, had responsibility for disciplining employees, and was involved in termination of employees. Accordingly, the court concluded, the supervisor met the requirements for an exempt executive employee.⁵¹

The court also found that the supervisor satisfied the administrative exemption.⁵² Under the FLSA, the duties test for that exemption requires that the employee’s primary duty must:

1. be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
2. include the exercise of discretion and independent judgment with respect to matters of significance.

As to the first prong of the duties test, the court found that the supervisor’s role in matching nurses to patients and ensuring that company standards were met was directly related to the company’s business of providing in-home nurses to care for patients. As to the

⁴⁵ *Id.* at **17-18.

⁴⁶ 8 Cal. Code of Regs. § 11040.

⁴⁷ 424 F. Supp. 2d 816 (E.D. Pa. 2006).

⁴⁸ N.J. Stat. Ann. § 34:11-56a.

⁴⁹ 29 C.F.R. § 541.100.

⁵⁰ *Bayada Nurses*, 424 F. Supp. 2d at 818.

⁵¹ *Id.* at 823.

⁵² *Id.* at 823-24.

second prong, the court found that making placement decisions as well as performing her other functions such as helping with hiring and firing, required the exercise of discretion and independent judgment.

Healthcare employers cannot assume, however, that all employees who are supervisors will qualify for the executive or administrative exemption. As with all exemptions, employers must carefully review the specific duties and responsibilities of the position. Thus, for example, in *Vanstony-Frazier v. CHHS Hospital Co., LLC*,⁵³ the U.S. District Court for the Eastern District of Pennsylvania, the same court that decided the *Bayada Nurses* case, denied summary judgment to a family medical practice that claimed its front desk supervisor was properly classified as exempt under either the executive or administrative exemptions. The supervisor was responsible for the “smooth, efficient and appropriate functions of the office and support staff,” including:

making certain that money was collected; that patients were being received well by the staff; that they were using appropriate phone language, appropriate gestures at the front desk; for those who were supposed to be answering the phone, that they would be answering the phones; for those who were supposed to be checking in, checking in, not reading, not doing other things; that the check-out person would be taking in the encounter forms as patients were finished being seen by the doctors; that that person would be entering the charges.⁵⁴

However, unlike the supervisor in *Bayada Nurses*, the front desk supervisor in *CHHS Hospital* did not have the authority to hire or fire employees and there was no evidence that her suggestions and recommendations regarding hiring and firing had any “particular weight,” nor was she involved in scheduling or training front desk employees.⁵⁵ Thus, the court concluded, the employer had “not met its burden to establish undisputed facts that would compel a reasonable juror to find that the position falls within the FLSA’s executive exemption.”⁵⁶

As to the administrative exemption, there was a dispute regarding the extent of the employee’s management responsibilities because the practice was short-staffed while she worked there and she performed many of the actual front desk duties, such as answering the phone, herself. In addition, it was unclear whether the supervisor exercised discretion and independent judgment. Although the employer argued that the front desk supervisor exercised discretion in implementing new policies and holding meetings to discuss them, there was evidence of only two such policies: (1) a new sign-in sheet; and (2) “specific instructions” on how to handle “problem calls.” The court, however, found that initiating these policies was not part of her primary duty. Again noting that the employer bears the burden of proving an exemption, the court ultimately concluded that there was insufficient evidence to establish that, as a matter of law, the supervisor met the requirements of the administrative exemption.⁵⁷

3. Compensation Requirements—An Overview

In addition to the duties requirement, an employee must meet certain compensation requirements to be properly classified as an exempt employee. Generally, under the FLSA, an exempt employee must be compensated either on a salary basis of not less than \$455 per week that cannot be reduced because of variations in quality or quantity of work,⁵⁸ or, for the professional and administrative exemptions, on a fee basis if the employee is paid an agreed-upon sum for a unique job regardless of the time required for completion of the task.⁵⁹ Like employees paid a straight salary, to satisfy the exemption test, an exempt employee paid on a fee basis must earn fees at a rate that would result in compensation equal to or exceeding \$455 per week if the employee worked 40 hours.⁶⁰ For example, if a task compensated via a fee required four hours and has a \$60 fee, the employee would earn \$600 in a week over a 40-hour period (\$15/hour x 40).

One exception to the salary or fee basis compensation requirement is the medical exemption for:

physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term “physicians” includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of

53 2010 U.S. Dist. LEXIS 387 (E.D. Pa. Jan. 4, 2010).

54 *Id.* at *4.

55 *Id.* at **15 – 16.

56 *Id.* at *17.

57 *Id.* at **28-29.

58 29 C.F.R. 541.600(a). This amount may be translated into equivalent amounts for periods longer than one week. *Id.* at § 541.600(b).

59 29 C.F.R. § 541.605.

60 29 C.F.R. § 541.605.

osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).⁶¹

However, this exemption does not apply to “pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.”⁶²

Some state exemption tests do not contain a compensation requirement for certain healthcare employees. For example, New York state law contains no salary or fee basis test for individuals who work in a professional capacity.⁶³

4. Compensation Requirements—Special Issues for Home Healthcare Employers

There are several ways that the compensation requirement can jeopardize the professional exemption. For instance, in *Bongat v. Fairview Nursing Care Center, Inc.*,⁶⁴ the employer lost the professional exemption because, although registered nurses were paid at a fixed salary, their time cards, payroll stubs, and pay checks established that their pay varied depending on their hours worked. The employer also offered extra pay as an inducement to ensure that less popular shifts were appropriately staffed. Although the court noted that additional compensation in addition to salary is not inconsistent with the salary basis compensation requirement,⁶⁵ the evidence demonstrated that the nurses were not salaried because their pay was subject to variations in the quantity of work performed.

The most recent hot issue in litigation against home healthcare providers is the common practice in the industry of paying home health clinicians on a “per-visit” basis in which a flat fee is paid for work related to a particular visit. Payment on a fee basis is defined by federal regulations as the payment of “an agreed sum for a single job regardless of the time required for its completion.”⁶⁶ In general, under the federal regulations, a “fee” is paid as compensation for a “unique” job, as opposed to “a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again.”⁶⁷ Whether the compensation is paid for a “unique” job in the home healthcare industry has been the subject of litigation.

For example, in *Fazekas v. Cleveland Clinic Foundation Health Care Ventures, Inc.*, a group of registered nurses who performed home healthcare services and were compensated on a per-visit basis challenged their classification as exempt professional employees on the grounds that they did not meet the fee basis test.⁶⁸ During home healthcare visits, the nurses treated patients, devised a healthcare protocol, updated the patient and the patient’s family regarding the patient’s condition, and, at times, supervised the home healthcare visits made by licensed practical nurses.⁶⁹ The Cleveland Clinic Foundation Health Care Ventures, Inc. (CCF) compensated the nurses on a per-visit basis regardless of the number of hours they worked.⁷⁰

The nurses contended that CCF’s per-visit compensation program did not qualify as payment on a “salary or fee basis.”⁷¹ Addressing this argument, the court first concluded that CCF paid the nurses an agreed-upon sum for each visit regardless of the time spent on the visit, as required under 29 C.F.R. § 541.605(a).⁷² Furthermore, the court—relying primarily on a 1992 opinion letter from the DOL—found that the nurses performed “unique” tasks during each home health care visit.⁷³ Accordingly, the Sixth Circuit Court of Appeals held that the nurses were professionals exempt from the FLSA’s overtime requirements because they not only met the duty requirements by possessing

61 29 C.F.R. § 541.304.

62 29 C.F.R. § 541.600; see also *Belt v. Emcare, Inc.*, 444 F.3d 403 (5th Cir. Tex. 2006) (physician assistants and nurse practitioners did not qualify for the medical exception to the salary basis test.); *Cuttic v. Crozer-Chester Med. Ctr.*, 760 F. Supp. 2d 513 (E.D. Pa. 2011) (even if Physician assistants satisfied the duties test, they are not exempt from the salary basis test under the medical exemption).

63 See 12 N.Y.C.R.R. § 142-2.14(c)(4)(iii).

64 341 F. Supp. 2d 181, 185 (E.D.N.Y. 2004).

65 29 C.F.R. § 541.118(b); see also DOL Opinion Letter FLSA2005-20 (Aug. 19, 2005) (stating that exempt employees may be paid a shift differential or overtime for working evenings and nights without affecting the professional exemption).

66 29 C.F.R. § 541.605(a).

67 *Id.*

68 204 F.3d 673, 676 (6th Cir. 2000).

69 *Id.* at 674.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 678.

advanced knowledge and exercising discretion, but also they were compensated on a fee basis because CCF paid them an agreed sum for the completion of each “unique” job regardless of the hours spent.⁷⁴

Two years later, in *Elwell v. University Hospitals Home Care Services*, the Sixth Circuit again addressed the “fee basis” requirement where home healthcare employees were paid on a per-visit basis.⁷⁵ Unlike CCF, University Hospitals Home Care Services (University) paid home healthcare nurses a pre-determined rate per visit for most types of visits but also paid hourly for certain visits that lasted longer than two hours.⁷⁶ Further, for at least part of the statutory period, University paid on an hourly basis for completion of paperwork associated with the visit. University also paid home healthcare nurses additional hourly pay for staff meetings, in-service training, and on-call duty.⁷⁷

The plaintiff in *Elwell* argued that the hybrid flat-fee and hourly compensation scheme did not constitute compensation on a “fee basis” as required by 29 C.F.R. § 541.300(a)(1).⁷⁸ The court agreed, concluding that in order for a payment to be fee-based, the employer must pay the employee an agreed sum for a specific job “regardless of the time required for its completion.”⁷⁹ The court held that registered nurses performing home healthcare services who were compensated on both a per-visit and hourly basis did not fall within the professional exemption.⁸⁰ In reaching this conclusion, the court found that “a compensation plan will not be considered a fee-basis arrangement if it contains any component that ties compensation to the number of hours worked.”⁸¹ Notably, the court distinguished *Fazekas* based on the fact that the home healthcare nurses in that case were compensated solely on a fee basis and did not receive hourly payments for any of their duties.⁸² In contrast, in *Elwell*, the court held that the professional exemption did not apply because home healthcare nurses in that case were not compensated on a “salary or fee basis.”⁸³

More recently, other per-visit payment methods in which clinicians received pay for time worked outside of the visit in addition to the visit fees have been challenged, even where the non-visit time is compensated on something other than an hourly basis. For example, in *Rindfleisch v. Gentiva Health Services*,⁸⁴ certain exempt clinicians were compensated for non-visit time by additional payments that increased in intervals based on the range of time that it took to complete the activity. This method of compensation for non-visit time took the duration of the activity into account, but was not based entirely on time spent on the activity. Gentiva Health Services (Gentiva) took the position that the payments qualified as “fee” payments under the FLSA.

Additionally, in *Rindfleisch*, the exempt clinicians typically earned more than \$455 per week in fixed fees from their visit activities. The plaintiffs argued that exempt employees paid on a fee basis cannot be paid “extras” in addition to the fee payments under any circumstances. Gentiva countered that “extras” may be permissible without jeopardizing the exemption if the fee payments equal more than \$455 per week to qualify as an alternative salary. While the professional exemption regulation provides that such employees must be “[c]ompensated on a salary or fee basis at a rate of not less than \$455 per week,” it does not state that these exempt employees must be solely compensated on that basis.⁸⁵ Further, Gentiva argued, the DOL’s regulation allowing employers to pay “extra” compensation on top of an exempt employee’s salary logically should be interpreted to allow “extra” compensation in addition to fee-basis payments, so long as the activities paid on a fee basis are paid at a rate equal to at least \$455 for the equivalent of a 40-hour week.⁸⁶ As such, even if the compensation for the non-visit time would not otherwise constitute a bona fide fee under the regulations, such payments are permissible “extras” that do not invalidate the exemption. This case has been conditionally certified as a collective action under the FLSA and is currently pending. Cross motions for

74 *Id.* at 679. Notably, the *Fazekas* court did recognize that “the work of nurses performing home health care visits may indeed become merely ‘a series of jobs which are repeated an indefinite number of times’ . . . and in such cases those nurses would not qualify for the professional exemption.” *Id.* (quoting 29 C.F.R. § 541.605(a)).

75 276 F.3d 832, 840 (6th Cir. 2002).

76 *Id.* at 835.

77 *Id.* at 837.

78 *Id.* at 838.

79 *Id.*

80 *Id.* at 840.

81 *Id.* at 838.

82 *Id.* at 840.

83 *Id.*

84 Civil Case No. 1:10-cv-3288-SCJ (N.D. Ga. May 10, 2010).

85 29 C.F.R. § 541.300(a)(1).

86 29 C.F.R. §§ 541.604, 541.605(b).

summary judgment as to whether Gentiva's pay practices satisfy the fee-basis compensation requirements of the professional exemption are currently pending as of the publication of this Littler Report.

As plaintiffs' employment lawyers have increased their focus on various aspects of compensation for exempt professional home healthcare employees, it is critical that employers review their pay practices and compensation policies for clarity. For example, if employees are compensated on a salaried or fee basis, does the policy identify all work encompassed in the salary or fee payments? In addition, to reduce legal risk, if employees are paid on a per-visit or similar fee basis, employers should avoid including fee components that directly tie compensation to the number of hours or days worked. While certain pay practices may be legal, employers should consider whether it is ultimately wiser to change the practices that are currently being targeted by numerous plaintiffs' lawyers to reduce potential exposure to expensive litigation.

B. Claims by Non-Exempt Employees

Non-exempt employees are subject to the minimum wage and overtime requirements of the FLSA. The claims most commonly asserted in class actions by non-exempt home care workers fall into the general category of uncompensated or "off-the-clock" work, whether it is work performed during meal periods, activities performed outside of scheduled working hours such as paperwork or training, or unpaid travel between patient homes. Depending on the type of work, different rules and best practices will apply as discussed below.

1. Meal Periods

The FLSA does not contain a requirement that employers provide meal periods. However, many state laws do contain such requirements. Although they vary by state, typically an employer must provide an unpaid meal period of a certain length after a specified period of work time (such as a 30-minute meal period after five hours of work). Beyond the numeric requirements, states also have different approaches regarding the extent of the employer's responsibility to provide meal periods. Two states with some of the strictest laws are California and Washington. Despite the California Supreme Court's recent opinion holding that employers need only ensure that meal breaks are *provided*,⁸⁷ not that employees take them, employers in California must strictly comply with requirements that govern when meal breaks must be made available. Also, the meal break must be uninterrupted and at least 30 consecutive minutes in duration. During the meal period, the employee must be relieved of all duty and free to leave the premises. Although an employee may waive the right to the meal period if the waiver is not "encouraged, coerced or incentivized" by the employer, California employers are well advised to document the availability of meal periods and use a written waiver form, signed by the employee, when an employee voluntarily waives the right to a meal break. Washington employers also have an affirmative obligation to ensure that employees receive uninterrupted 30-minute meal periods completely free from duty, unless an employee voluntarily waives the meal period and is paid for working through the meal period.⁸⁸

If, in compliance with state law or employer policy, a meal period is provided, the FLSA does regulate certain aspects of the break time. For example, a meal period of less than 30 minutes generally must be paid, while a meal period of 30 minutes or more may be unpaid if the employee is "completely relieved from duty."⁸⁹ To determine if an employee is "completely relieved from duty," most courts analyze whether the meal period is predominantly for the benefit of the employee or the employer.⁹⁰

Healthcare employers have faced a wave of class action litigation in which employees claim they worked during meal periods that were automatically deducted from their pay. Plaintiffs' attorneys have brought these types of claims against large healthcare systems that include home healthcare agencies.⁹¹ Although some courts have allowed these cases to proceed, more recently a number of courts have dismissed, denied certification, or decertified these types of class actions, generally finding that automatic meal break deduction policies are not *per se* unlawful and individual factual issues regarding whether employees in different departments with different duties were required to or did

⁸⁷ *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004 (2012).

⁸⁸ *Pellino v. Brink's*, 164 Wn. App. 668, 267 P.3d 383 (Wash. Ct. App. 2011).

⁸⁹ 29 C.F.R. § 785.19(a).

⁹⁰ See, e.g., *Beasley v. Hillcrest Med. Ctr.*, 78 Fed. Appx. 67, 70-71 (10th Cir. 2003); *Roy v. County of Lexington*, 141 F.3d 533, 545 (4th Cir. 1998); *Reich v. Southern New Eng. Telecomm's Corp.*, 121 F.3d 58, 64 (2d Cir. 1997); *Henson v. Pulaski Cnty. Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993); *Haviland v. Catholic Health Initiatives — Iowa, Corp.*, 729 F. Supp. 2d 1038, 1055-57 (S.D. Iowa 2010).

⁹¹ See, e.g., *Sampson v. MediSys Health Network, Inc.*, 2012 U.S. Dist. LEXIS 103012, at **50-51 (E.D.N.Y. Feb. 9, 2012), *magistrate's recommendations adopted in part by*, 2012 U.S. Dist. LEXIS 103052, at **6-7 (E.D.N.Y. July 24, 2012); *Davis v. Abington Mem'l Hosp.*, 817 F. Supp. 2d 556, 561 (E.D. Pa. 2011); *Hinterberger v. Catholic Health Sys.*, 2009 U.S. Dist. LEXIS 97944, at *5 (W.D.N.Y. Oct. 20, 2009); *Gordon v. Kaleida Health*, 2009 U.S. Dist. LEXIS 95729, at **4-5 (W.D.N.Y. Oct. 13, 2009).

work during unpaid meal periods were not amenable to class treatment—particularly when the healthcare system had a timekeeping system or policy that allowed employees to override the automatic deduction.⁹²

For example, in *Sampson v. MediSys Health Network, Inc.*, the court recognized that “a policy of automatic meal deductions does not *per se* violate the FLSA,” but did not dismiss the claims of a registered nurse who allegedly performed duties such as phone calls, equipment maintenance, documentation, and emergency response during her lunch periods.⁹³ On the other hand, the court dismissed the class claims because, while the complaint alleged that all employees were subject to the meal deduction policy, there were no allegations about how class members spent their meal periods.⁹⁴

In *Hinterberger v. Catholic Health System*, nurses and respiratory therapists alleged on behalf of a class including home care workers that 30 minutes were automatically deducted from their pay even when they worked through their meal periods providing patient care.⁹⁵ Although the court conditionally certified a class of employees who worked at inpatient facilities, the court refused to include employees who worked in patient homes finding they were not similarly situated to the in-patient facilities’ employees.⁹⁶

Nevertheless, despite some of the favorable outcomes, these cases illustrate the risk of costly and prolonged litigation that healthcare institutions, including home healthcare agencies, may face as a result of compensation systems that provide for automatic deductions of meal periods. Best practices to minimize these risks include recording, enforcing, and auditing meal periods. As part of their hours of work submission process, employers may ask employees to certify whether they received an uninterrupted 30-minute consecutive meal period break, provide a reporting mechanism for missed and interrupted meal periods, and a method to pay any extra compensation that may be due. In some cases, meal waivers may be appropriate.⁹⁷ Further, many employers are requiring their non-exempt employees to clock-out for meal periods and clock-in at the conclusion of the break to establish a clear record of the meal period.

2. Compensable Work Outside of Patient Care Duties

Compensable work under the FLSA is defined broadly. Although the FLSA itself does not define “work” directly, it defines the term “employ” as “to suffer or permit to work.”⁹⁸ The U.S. Supreme Court has defined compensable work as “physical or mental exertion (whether burdensome or not) controlled or required by the employer.”⁹⁹

To provide some limits on the broad definition of work, Congress enacted the Portal-to-Portal Act in 1947. The Act excluded certain preparatory activities from the definition of work, including activities before or after the employee’s “principal” activities.¹⁰⁰ This, however, does not make all pre-shift or post-shift activities non-compensable. To the contrary, the Supreme Court has held that such activities are still compensable if they are “an integral and indispensable part of the principal activities.”¹⁰¹ In turn, “integral and indispensable” activities are “necessary to the principal work performed and done for the benefit of the employer.”¹⁰²

Thus, any activity that is a necessary part of the job and performed for the employer’s benefit will generally be compensable. In the home healthcare context, while patient care activities would be considered “principal” activities, there are a number of “integral and indispensable” activities that may be considered equally compensable. For example, compensable work generally includes: (1) paperwork or charting that is

92 See e.g., *Frye v. Baptist Mem’l Hosp., Inc.*, 2012 U.S. App. LEXIS 17791 (6th Cir. 2012) (the availability of an exception log for work during automatically-deducted meal breaks, and dissimilarities between hospital departments and work duties supported decertification); *Sampson*, 2012 U.S. Dist. LEXIS 103012, at **23-25, 50-54 (refusing to dismiss named plaintiff’s meal deduction claims, but dismissing class claims); *Davis*, 817 F. Supp. 2d at 561-62, 565 (dismissing amended complaint that included meal deduction claims); *Hinterberger*, 2009 U.S. Dist. LEXIS 97944, at **5-6, 15-23 (certifying class of employees in inpatient facilities with respect to meal deduction claims but holding that home care nurses were not similarly situated); *Gordon*, 2009 U.S. Dist. LEXIS 95729, at **4-6, 16-20 (same).

93 *Sampson*, 2012 U.S. Dist. LEXIS 103012, at **23-25.

94 *Id.* at **50-54.

95 *Hinterberger*, 2009 U.S. Dist. LEXIS 97944, at **5-7.

96 *Id.* at **15-21.

97 See, e.g., California Dept. of Industrial Relations, IWC Order 4-2001 11(D); Washington Dept. of Labor & Industries, Admin Policy ES.C.6.

98 29 U.S.C. § 203(g).

99 *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944).

100 29 U.S.C. § 254.

101 *Steiner v. Mitchell*, 350 U.S. 247 (1956).

102 *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff’d in part and rev’d in part*, *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

required or necessary for the job; (2) work-related phone calls or other communications with supervisors; (3) mandatory meetings; and (4) training that is required by the employer, attended during work hours, or directly related to the job.¹⁰³

Under the FLSA, an employer must pay for work that it requires or requests, as well as work that it knows or *should* know is occurring.¹⁰⁴ As stated by the DOL, an employer “cannot sit back and accept the benefits” of work performed by its employees.¹⁰⁵ Rather, an employer must “exercise its control and see that the work is not performed if the employer does not want it to be performed” by promulgating and enforcing workplace rules.¹⁰⁶

The FLSA’s assumption that the employer must “control” the work is particularly challenging for employers, such as home healthcare agencies with a remote workforce. Because employees are not on-site, the employer maintains less control over the employees’ activities. This fact has led to increasing class action litigation in the home healthcare industry,¹⁰⁷ which will likely increase if the DOL’s proposed rule to redefine the companionship exemption is finalized.

To minimize the risk of claims for uncompensated or “off-the-clock” work, employers should consider implementing policies and timekeeping systems that require all work time to be recorded, and informing employees that they may be subject to discipline for failure to follow these policies. Home healthcare employers should also consider specifically listing the various types of activities for which time should be recorded to provide employees with a clear understanding of what activities constitute work. This is particularly true for employers paying non-exempt employees on a per-visit basis, as these employees may not understand the importance of capturing all time worked because their straight time pay is based on the number of visits completed and not the number of hours worked.

Regardless of whether a non-exempt employee is paid on an hourly or per-visit basis, the employee must be paid overtime. Overtime pay is required after an employee has worked a certain threshold of hours, generally 40 hours per week under the FLSA,¹⁰⁸ and *all* work hours must be counted toward the overtime threshold. If employers are not capturing all work hours, they are not paying the correct amount of overtime. Employers should also confirm that they are calculating overtime correctly. Generally, overtime must be paid at one and one-half times the employee’s regular rate of pay.¹⁰⁹ The regular rate of pay means “all remuneration for employment,” including bonuses, commissions, and other types of additional pay, except for those categories specifically excluded in the statute.¹¹⁰ These additional payments must be added to all hourly or fee-based wages before the appropriate overtime payment is calculated for the work week. However, to the extent that a non-exempt employee has already been paid straight time pay for all hours worked, the employer will only be obligated to pay an additional half-time rate for overtime hours. In some circumstances, for example, if a per-visit rate includes compensation for *all* work, the employer may be able to pay half-time for overtime hours depending on state law. Third, employers must ensure compliance with federal and state minimum wage requirements.¹¹¹ This means that an employee’s compensation divided by *all* hours worked must be equal to or greater than the minimum wage. It is important for employers to determine the minimum wage under both federal and state law, and pay whichever is more favorable to the employee.

3. Travel Time

The Portal-to-Portal Act discussed in the previous section also had another purpose: to reduce employer liability for travel time. Accordingly, the FLSA made non-compensable “walking, riding, or traveling to and from the actual place of performance of the principal activity.”¹¹² In other words, an employer generally need not pay for travel between the employee’s home and the first job site at the start of the day, or travel between the last job site and the employee’s home at the end of the day.

103 See *Sampson v. MediSys Health Network, Inc.*, 2012 U.S. Dist. LEXIS 103012, at **25-28 (E.D.N.Y. Feb. 9, 2012), *magistrate’s recommendations adopted in part by*, 2012 U.S. Dist. LEXIS 103052, at **6-7 (E.D.N.Y. July 24, 2012); see also 29 C.F.R. § 785.27 (compensability of training time).

104 29 C.F.R. §§ 785.11-785.12.

105 29 C.F.R. § 785.13.

106 *Id.*

107 See, e.g., *Brooks v. Watson Home Health Care, Inc.*, Case No. 2:12-cv-13599-GCS-RSW (E.D. Mich. Aug. 14, 2012); *Wilk v. VIP Health Care Services, Inc.*, Case No. 10 Civ. 5530 (ILG) (JMA) (E.D.N.Y. Nov. 30, 2010); *Davis v. Abington Mem’l Hosp.*, 817 F. Supp. 2d 556 (E.D. Pa. 2011); *Correa v. Gellhomecare, Inc.*, Case No. 11-80003-CIV-MARRA (S.D. Fla. Jan. 3, 2011).

108 29 U.S.C. § 207(a)(1). Some states have more stringent requirements. For example, California requires that non-exempt employees must be paid overtime if they work more than eight hours per day. Cal. Lab. Code § 510.

109 *Id.*

110 29 U.S.C. § 207(e).

111 29 U.S.C. § 206.

112 29 U.S.C. § 254.

However, travel time between job sites or patient homes generally is compensable.¹¹³ The failure to include travel time in hours worked can result in overtime and minimum wage liability. For example, a group of home healthcare workers in Pennsylvania brought a class action against their employer alleging that they had not been paid for travel time between patient homes and were owed overtime.¹¹⁴ The case settled for \$2.2 million.

In addition, if an employee performs work activities at home, such as paperwork or scheduling activities, home-to-work travel time may become compensable by operation of the “continuous workday” rule.¹¹⁵ The continuous workday rule originated in manufacturing plants that required workers to put on certain gear, and then walk to their work areas. Although the “travel time” to an employee’s work area would not typically be compensable, the U.S. Supreme Court held that it was compensable in this situation because the workers began working when they put on their required gear.¹¹⁶ If the continuous workday rule were applied to home healthcare employees who perform work at home before traveling to their first patient, home to work travel time would be compensable.

To reduce the risk of liability for failure to pay employees for patient-to-patient travel time, home healthcare employers should consider certain basic precautions. First, the travel time between patient visits should be considered time worked, and paid accordingly, either as straight time or overtime. Note that it may be appropriate to pay a reduced rate for travel time, *i.e.*, minimum wage, in certain circumstances. Second, compensable travel time should also be counted when determining whether the minimum wage obligation has been met and whether overtime should be paid. Further, it is recommended that homecare health employers establish and enforce policies that define the workday and prohibit work from home to minimize liability under the continuous workday rule. In addition, employers might consider using GPS, certain smartphone applications, and other aids to assist with tracking employees’ travel time.

C. Independent Contractors

In addition to the issue of whether home healthcare workers are classified as exempt or non-exempt employees, in some situations there may be a dispute as to whether home healthcare workers are properly classified as employees at all. This is a significant issue because only employees are subject to the FLSA and its regulations governing minimum wage and overtime pay. Many home healthcare agencies’ classification of nurses and others who provide in-home healthcare as independent contractors instead of employees have been challenged, and courts ruling on the issue have frequently found that the individuals asserting the claims were “employees” entitled to back pay.¹¹⁷

The definition of an independent contractor differs under various federal and state statutes, including federal tax law, the FLSA, and state workers’ compensation and unemployment compensation laws. Thus, an individual may be an independent contractor for unemployment compensation purposes but an employee under the FLSA.¹¹⁸

The FLSA defines an employee as an individual who an employer “suffer[s] or permit[s] to work.”¹¹⁹ The Supreme Court held that an individual’s status as an independent contractor or employee under the FLSA should be determined by looking at the “economic reality” of the relationship and examining “the circumstances of the whole activity.”¹²⁰

In assessing the “economic reality” of the relationship, courts look at a variety of factors that generally include the following:

1. the degree of control exercised by the alleged employer;
2. the extent of the worker’s investment in equipment and tools used in the performance of the job;
3. the worker’s opportunity for profit or loss;

113 29 C.F.R. § 785.33.

114 *Thomas v. Total Health Home Care Corp.*, Case No. 002493 (Phila. Cnty., Pa. Ct. of Common Pleas, May 2006); *see also Brooks v. Watson Home Health Care, Inc.*, Case No. 2:12-cv-13599-GCS-RSW (E.D. Mich. Aug. 14, 2012); *Crouch v. Guardian Angel Nursing, Inc.*, 2009 U.S. Dist. LEXIS 103831, at **16-17 (M.D. Tenn. Nov. 4, 2009).

115 *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005).

116 *Id.*

117 *See, e.g., Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988); *Chapman v. A.S.U.I Healthcare of Tex., Inc.*, 2012 U.S. Dist. LEXIS 117969 (S.D. Tex. Aug. 21, 2012); *Crouch v. Guardian Angel Nursing, Inc.*, 2009 U.S. Dist. LEXIS 103832 (M.D. Tenn. Nov. 4, 2009); *Wilson v. Guardian Angel Nursing, Inc.*, 2008 U.S. Dist. LEXIS 59623 (M.D. Tenn. July 31, 2008); *Gayle v. Harry’s Nurses Registry, Inc.*, 2009 U.S. Dist. LEXIS 17768 (E.D.N.Y. Mar. 9, 2009).

118 *See, e.g., Wilson*, 2008 U.S. Dist. LEXIS 59623, at *34 (holding that classification as independent contractor by state unemployment office has no bearing on FLSA classification).

119 29 U.S.C. § 203(g).

120 *Rutherford Food Corp.*, 331 U.S. 722, 727-30 (1947).

4. the skill and initiative required in performing the job;
5. the permanency of the relationship; and
6. the extent to which the work is an integral part of the employer's business.¹²¹

Courts also generally agree that no single factor is dispositive.¹²²

In *Brock v. Superior Care, Inc.*, for example, the Second Circuit considered the following factors in determining the status of temporary health-care personnel, primarily nurses, engaged by a healthcare agency to provide care to individual patients, hospitals, nursing homes, and other health care institutions: the control exercised by the agency, the worker's opportunity for profit or loss, the degree of skill and independent judgment required, the permanence of the working relationship, and the extent to which the work was an integral part of the agency's business.¹²³ In assessing these factors, the court noted that patients contracted directly with the agency, not with the nurses, for services, and the agency set the nurses' wage rate and paid their hourly wages. In fact, the nurses were prohibited from entering into private pay arrangements with the patients. Nurses were permitted to hold other jobs, including positions with other nursing-care providers, and many of the nurses worked for the agency only a few weeks in a year. Only a few relied on the agency as their primary source of income.

Based on these facts, the court first found that the agency exerted control over the nurses, not only setting their wage rate and paying their wages, but also supervising their work by monitoring their patient care notes and visiting job sites. Second, as to the opportunity for profit and loss, it was undisputed that the nurses did not share in profit or loss from the business. Third, with respect to skills and independent judgment, the court recognized that the nurses were skilled, but concluded that "nothing in the record reveals that they used these skills in any independent way. Rather, the nurses depended entirely on referrals to find job assignments, and the agency in turn controlled the terms and conditions of the employment relationship." The court's assessment was that "[a]s a matter of economic reality, the nurses' training does not weigh significantly in favor of independent contractor status."¹²⁴ Fourth, as to the degree to which the nurses' work was integral to the company's business, the Second Circuit agreed with the district court that "the services rendered by the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request."¹²⁵ Fifth, and finally, although the record indicated that the nurses were transient workers who typically worked for several employers and worked for the agency only a small percentage of the time, the court stated that "even where work forces are transient, the workers have been deemed employees where the lack of permanence is due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative," and concluded that "[i]n the present case, the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently."¹²⁶ The Second Circuit found, based on the totality of the circumstances, that as a matter of economic reality the nurses were employees.¹²⁷

In *Wilson v. Guardian Angel Nursing, Inc.*, the court performed a similar analysis regarding licensed practical nurses (LPNs) who were placed by a nurse staffing company in private homes and medical facilities.¹²⁸ Although the LPNs were (1) responsible for their own training and maintaining necessary accreditations; (2) responsible for carrying their own insurance;¹²⁹ and (3) signed Independent Contractor Agreements and a Contractor's Statement of Understanding in which they stipulated that they were "independent contractors" not "employees" who provided care in accordance with their own judgment,¹³⁰ the court nevertheless determined that the LPNs were employees, not independent contractors, under the economic realities test of the FLSA.

Assessing the control factor, the court found that the company retained ultimate control over the LPNs in many respects.¹³¹ Although the LPNs were not obligated to accept any shifts, they could only work those hours approved by the staffing company, and if they were

121 See, e.g., *Brock*, 840 F.2d at 1058-59; *Chapman*, 2012 U.S. Dist. LEXIS 117969, at *8; *Crouch*, 2009 U.S. Dist. LEXIS 103832, at *38.

122 *Brock*, 840 F.2d at 1059; *Chapman*, 2012 U.S. Dist. LEXIS 117969, at *8.

123 *Brock*, 840 F.2d at 1058-59.

124 *Id.* at 1060.

125 *Id.* at 1059.

126 *Id.* at 1060-61.

127 *Id.* at 1061.

128 *Wilson*, 2008 U.S. Dist. LEXIS 59623.

129 *Id.* at *13.

130 *Id.* at *15.

131 *Id.* at **47 - 51.

unable to work the assigned shifts, the staffing company had to approve any potential shift-swapping or substitution. LPNs might also be required to extend their assigned shift if the next scheduled nurse did not arrive on time to relieve the nurse on the prior shift. The staffing company also managed and oversaw the work of LPNs to a very high degree. The plan of care was prescribed by the company, and the LPNs were required to fill out forms that corresponded with the procedures to be performed, and to make hourly notes to be faxed to the staffing company throughout the course of their shifts. In addition to reviewing all documentation to check it against the physician's plan of care, the company spoke to the clients' families almost daily.

As to investment in equipment and materials, the court determined that although LPNs were required to provide their own uniforms, scissors, stethoscope, thermometer, and blood pressure cuff, these items could be purchased for a total of approximately \$45 and, therefore, required minimum investment.¹³² With respect to sharing in profit and loss, the court noted that “[i]t is the mark of an independent contractor that a stake in the venture provides both carrot and stick, such that planning, efficiency and skill are rewarded above and beyond the initial contract.”¹³³ Applying this standard, the court concluded, “it is obvious that Plaintiffs had no opportunity for profit or loss; once the work was accepted, Plaintiffs were paid a predetermined rate without regard to their skill, efficiency, or any other variable relative to performance or the circumstances of the client.”¹³⁴

Looking at the skills factor, the court described the key question as follows: “whether, in the larger picture, LPNs have the skills necessary to locate and manage discrete work projects characteristic of independent contractors, or whether their skills are of the task-specific, specialized kind that form a piece of a larger enterprise, suggesting employee status.”¹³⁵ Quoting the Second Circuit's decision in *Brock*, discussed above, the court concluded that “[t]he nurses in the present case possess technical skills but nothing in the record reveals that they used these skills in any independent way.”¹³⁶

The court also reached the same conclusion as the Second Circuit in *Brock* with regard to the permanency of the relationship. Although the court found that about 50 percent of the LPNs worked less than 40 hours per week, many simultaneously performed nursing work for other entities, and some stayed with Guardian Angel Nursing for only a few weeks, it concluded that this work pattern did not indicate that “Plaintiffs are an enterprising group who successfully brokered their skills for isolated assignments, but rather that the industry does not guarantee steady work with one company for those in need of full-time hours.”¹³⁷ Finally, as in *Brock*, it was clear to the court that the LPNs' work was integral to the company's business of providing private duty nursing services to patients.¹³⁸

As these cases demonstrate, although some home healthcare workers may be independent contractors under the FLSA, given the control that many home healthcare agencies maintain over their service providers and the fact that the work performed is an integral part of the agency's business, there is a significant risk that courts will find an employer-employee relationship. Applying the economic realities tests, courts generally disregard how the parties have agreed to characterize the relationship, focusing instead on the multiple factors discussed above to provide a fuller picture of the relationship.

D. Joint Employment

More than one entity may be an employee's legal employer under the FLSA. Indeed, the concept of joint employment presents a significant challenge for FLSA compliance in the home healthcare arena. Two or more employers may be “joint employers” if “the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek.”¹³⁹ The DOL and courts often construe joint employment broadly in favor of employees, and an entity's status as a joint employer may not always be immediately clear from the circumstances.¹⁴⁰

132 *Id.* at *44.

133 *Id.* at *45.

134 *Id.*

135 *Id.* at *42

136 *Id.* at *43 (quoting *Brock*, 840 F.2d at 1060).

137 *Id.* at **39 – 40.

138 *Id.* at *51.

139 29 C.F.R. § 791.2(b) (2012).

140 See, e.g., *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) (government agency); *Lemaster v. Alternative Healthcare Solutions Inc.*, 726 F. Supp. 2d 854 (M.D. Tenn. 2010) (staffing agency); *Zachary v. Rescare Okla., Inc.*, 471 F. Supp. 2d 1175 (D. Okla. 2006) (parent corporation).

The DOL's interpretive regulations identify three sets of circumstances under which a joint employment relationship generally will be considered to exist: (1) where the employers are parties to a sharing arrangement of the employee's services; (2) where one employer acts for another in relation to the employee; or (3) where the employers are not completely disassociated with respect to the employment of a particular employee and the employers share control over an employee's work.¹⁴¹ Whether multiple entities are joint employers of an employee "depends upon all the facts in the particular case."¹⁴² In making the determination, the DOL eschews rigorous application of clearly defined factors in favor of an "economic realities" test that examines the specific employment relationship at issue. According to the DOL, relevant considerations include "whether there are common officers or directors of the companies; the nature of the common management support provided; whether employees have priority for vacancies at the other companies; whether there are any common insurance, pension or payroll systems; and whether there are any common hiring, seniority, recordkeeping or billing systems."¹⁴³ No single factor is determinative. "[R]ather the entire relationship is to be viewed in its totality."¹⁴⁴

Courts generally agree that the "concept of joint employment should be defined expansively under the FLSA."¹⁴⁵ Consequently, a number of courts apply the "economic realities" analysis.¹⁴⁶ However, some courts have criticized the DOL's wide-angle view. The U.S. Court of Appeals for the Seventh Circuit, for example, remarked that the regulations do not "provide much guidance in determining the parameters of what constitutes a joint-employment relationship."¹⁴⁷ Some courts have attempted to develop concrete tests for analyzing joint employment relationships.¹⁴⁸

The most commonly applied test is that espoused by the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*.¹⁴⁹ In *Bonnette*, the Ninth Circuit attempted to distill the amorphous "economic realities" analysis into a four-factor test.¹⁵⁰ Those factors included "whether an alleged employer: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; or (4) maintained employment records."¹⁵¹ Applying these factors, the Ninth Circuit determined that county agencies who provided aid funding to disabled individuals to hire in-home "chore workers" were joint employers.¹⁵² The first two *Bonnette* factors address the extent of the putative employer's control over the nature and structure of the working relationship.¹⁵³ The final two factors address the extent of the putative employer's control over the economic aspects of the working relationship.¹⁵⁴

Recently, in *In Re: Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation*, the U.S. Court of Appeals for the Third Circuit attempted to "refine" the *Bonnette* analysis by melding *Bonnette's* four factors with additional "real world" considerations.¹⁵⁵ Like the *Bonnette* test, the *Enterprise* joint employer test weighs a purported employer's authority to hire and fire employees, its control over employee records, and the degree of supervision. Unlike the *Bonnette* test, however, the *Enterprise* test emphasizes "day-to-day" employee supervision, including employee discipline.¹⁵⁶ The *Enterprise* test also assesses "the alleged employer's authority to promulgate work rules and assignments and to set the employees' conditions of employment: compensation, benefits, work schedules, including the rate and method of payment,"¹⁵⁷ and

141 29 C.F.R. § 791.2(b) (2012).

142 *Id.*

143 Dept. of Labor Opinion Letter June 14, 2005.

144 Dept. of Labor Opinion Letter Sept. 11, 2000.

145 *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 917 (9th Cir. 2003).

146 *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 143 (2d Cir. 2008) (applying economic realities test to hold hospital and referral agencies to be joint employers of temporary CNAs).

147 *Moldenhauer v. Tazewell-Pekin Consolidated Commc'ns Ctr.*, 536 F.3d 640, 644 (7th Cir. 2008).

148 *See, e.g., Barfield*, 537 F.3d at 143 (discussing cases).

149 704 F.2d 1465 (9th Cir. 1983).

150 *Id.* at 1470.

151 *Id.* at 1470.

152 *Id.* at 1468.

153 *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998).

154 *Id.* at 676.

155 683 F.3d 462, 469-70 (3rd Cir. 2012).

156 *Id.* at 469.

157 *Id.* at 469-70.

leaves room for “other indicia of ‘significant control’” identified in a particular case. The *Enterprise* test had an immediate impact: the court held that a parent company was not a joint employer of its subsidiaries’ employees where the parent merely acted in an advisory role as to the terms and conditions of employment for those employees.¹⁵⁸

While it is too early to determine whether the *Enterprise* test will take hold, the four factors that comprise the *Bonnette* test are commonly applied. They are far from universal, however, and several courts have found an entity to be a joint employer even in the absence of all *Bonnette* factors.¹⁵⁹ Ultimately, the majority of courts conclude, like the DOL, that “it is the totality of the circumstances, and not any one factor, which determines whether a worker is the employee of a particular alleged employer.”¹⁶⁰

Regardless of the specific test applied, the question of joint employment in the home healthcare context, as in the health care industry generally, most often arises when “a company has contracted for workers who are directly employed by an intermediary company.”¹⁶¹ In these cases, as in *Enterprise*, courts often focus on whether the alleged joint employer took an active role in the employees’ employment. Specifically, courts examine whether the putative joint employer maintained time records and personnel files, including job description receipts and employee handbook acknowledgements, and whether the entity could hire, supervise, discipline, and terminate employees.¹⁶²

For example, in *Lemaster v. Alternative Healthcare Solutions Inc.*, the court concluded that a staffing agency that gave nurses their work assignments, collected their time sheets, and maintained their personnel files, and another entity that processed payroll and paid the nurses’ wages, were the nurses’ joint employers.¹⁶³ The owners of the staffing agency were joint employers because they interviewed and hired the nurses and determined their salaries.¹⁶⁴ The court refused to find that the home healthcare provider, who leased employees from the staffing company, was also a joint employer because there was no evidence suggesting that the home healthcare provider had the power to hire or fire the nurses, control their schedule, determine their rate of pay, or discipline them.¹⁶⁵

Joint employment concerns also commonly arise in cases involving independent, but affiliated corporations. Affiliated corporations generally are not joint employers merely because they have common ownership or are otherwise part of a common enterprise.¹⁶⁶ However, courts have found a joint employer relationship where a parent corporation performs administrative services or provides administrative support for a subsidiary. For example, in *Zachary v. Rescare Okla., Inc.*, the court held that rehabilitation training specialists were jointly employed by the company for which they performed services and the company’s parent corporation.¹⁶⁷ The parent corporation determined the nonexempt status of the subsidiary’s employees, prepared the employee handbook used by the subsidiary, and employees of the subsidiary who had questions or complaints regarding certain types of employment-related issues were directed to contact the parent corporation’s human resources department.¹⁶⁸

Notably, in *Zachary*, the court found the parent company was a joint employer despite an administrative services agreement that severely limited the parent’s control over the subsidiary and made the subsidiary solely responsible for, among other things, the supervision of the specialists.¹⁶⁹ According to the court, the reality of the relationship between the two companies governed the analysis, not the terms of the agreement.¹⁷⁰ In any event, under the agreement, the parent company retained responsibility for “processing employee payrolls,” advising the subsidiary

158 *Id.* at 471.

159 *See, e.g., Antenor v. D & S Farms*, 88 F.3d 925, 938 (11th Cir. 1996) (company could qualify as a joint employer even though another company hired the workers and assigned them jobs, directly supervised them, disciplined and discharged them, and paid their wages).

160 *Baystate Alternative Staffing*, 163 F.3d at 676; *see also Schultze v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 306 n.2 (4th Cir. 2006) (finding joint employment relationship because “the undisputed facts here fit readily within the third example of joint employment listed in the regulations” but noting that “[i]n some cases it may be useful for a court to consider [other] factors”).

161 *A-One Med. Servs., Inc.*, 346 F.3d at 917.

162 *See, e.g., Lemaster v. Alternative Healthcare Solutions Inc.*, 726 F. Supp. 2d 854 (M.D. Tenn. 2010).

163 *Id.* at 864.

164 *Id.* at 864-65.

165 *Id.* at 867.

166 *See Davis v. Abington Mem’l Hosp.*, 817 F. Supp. 2d 556 (E.D. Pa. 2011) (corporations with common ownership or belonging to single corporate enterprise are not, without more, joint employers).

167 471 F. Supp. 2d 1175, 1179-80 (D. Okla. 2006).

168 *Id.* at 1180.

169 *Id.* at 1182.

170 *Id.*

regarding compliance with governmental regulations, providing legal counsel, providing personnel to assist with human resources matters, and advancing working capital, all of which further supported a finding of joint employment.¹⁷¹

The U.S. Court of Appeals for the Ninth Circuit has even extended the joint employer doctrine beyond affiliated corporations to an otherwise unaffiliated company that shared administrative services and a degree of control over employees. In *A-One Medical Services, Inc.*,¹⁷² a provider of home healthcare services, A-One, entered into negotiations to purchase a company called Alternative Rehabilitation Home Healthcare. During negotiations, A-One transferred a number of patients to Alternative, along with the nurses who provided care to those patients, and began overseeing patient care at Alternative, supervising Alternative employees, and contracting vendors for Alternative.¹⁷³ The two companies also integrated their operations, sharing a receptionist and an answering service, and “perhaps most significantly,” used a single scheduler for both companies’ employees.¹⁷⁴ Based on these facts, the two companies were found to be joint employers.¹⁷⁵

A finding that two or more entities are joint employers may have significant consequences. “[A]ll joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions, with respect to the entire employment for the particular workweek.”¹⁷⁶ In other words, when one employee performs separate work for two joint employers in the same workweek, each of those employers is independently responsible for ensuring proper compensation for the employee.

As in *A-One Medical Services, Inc.*, when a non-exempt nurse works for two home healthcare providers within the same workweek, which are joint employers, both entities are jointly and independently responsible for ensuring the nurse receives all due compensation. This means that if the nurse works 20 hours for one employer and 20 hours for another and one employer fails to pay the nurse, the other employer may be liable for paying the nurse for all 40 hours of work. Moreover, if the nurse works more than 40 hours on a combined basis, the employee is entitled to overtime under the FLSA. In other words, joint employers must aggregate an employee’s hours of work for each employer to determine overtime eligibility.

Moreover, calculating the employee’s overtime rate can be complicated when a non-exempt employee works for multiple joint employers at different hourly rates. Absent any agreement to the contrary, the employee’s overtime rate in any given workweek is one and one-half times the weighted average of the employee’s regular hourly rate.¹⁷⁷ The weighted average is the employee’s total compensation from all jobs divided by the total number of hours worked in the workweek. To illustrate, if in a given workweek, an employee works 20 hours at \$15.00 per hour for one employer ($20 \times \$15.00 = \300) and 30 at \$12.00 per hour for a joint employer ($30 \times \$12.00 = \360), the employee’s blended rate would be \$13.20 per hour ($\$300 + \$360 = \$660 / 50 = \13.20). Notably, the weighted average may change from week to week if the employee’s hours fluctuate. Employers must, therefore, calculate the weighted average on a workweek-by-workweek basis.

It may also be difficult for joint employers to determine which employer must pay the employee’s overtime. Again, the entity responsible for paying overtime may be determined on a pro rata basis. Thus, if an employee works 60 percent of her hours in a workweek for one joint employer, that employer would be responsible for 60 percent of the employee’s overtime pay, at one and one-half times the weighted average of her hourly rate.

To simplify these issues, Section 7(g)(2) of the FLSA allows the employer and employee to agree, in advance of the performance of the work, that the employee will be paid during overtime hours at a rate not less than one and one-half times the non-overtime rate established for whichever job the employee is performing during the overtime hours.¹⁷⁸ In other words, the employer and employee may enter into an agreement specifying that, once the employee has worked 40 hours in a week, the employee’s regular rate for purposes of calculating overtime would depend on the employer for whom the employee was working.

171 *Id.* But see *Sampson v. MediSys Health Network, Inc.*, 2012 U.S. Dist. LEXIS 103052 (E.D.N.Y. July 24, 2012) (system-wide policies and certain employee benefit plans, centralized supply chain management, centralized payroll, and “a centralized approach to management and human resources,” insufficient to establish joint employment where plaintiffs failed to allege sufficient facts to indicate that system had any direct role in hiring or firing the plaintiffs, that it supervised or controlled their work schedules, or “had any direct role in controlling the plaintiffs’ conditions of employment or in determining their rate and method of payment”).

172 346 F.3d at 912.

173 *Id.* at 912-13.

174 *Id.* at 913.

175 *Id.* at 918.

176 29 C.F.R. § 791.2(a) (2012).

177 29 C.F.R. § 778.115

178 29 U.S.C. § 217(g)(2) (2012); see also 29 C.F.R. § 778.419.

For an employer to take advantage of this option, it must meet certain criteria. First, the overtime rate must be one-and-one-half times a bona fide rate.¹⁷⁹ A bona fide rate is an hourly rate that is greater than the applicable minimum rate for the work performed is the rate actually paid for such work when performed during non-overtime hours.¹⁸⁰ Second, the overtime hours for which the overtime rate is paid must actually qualify as overtime.¹⁸¹ Third, the agreed upon overtime rate must be paid for all overtime hours.¹⁸²

The method that joint employers use to calculate overtime typically depends on where the employers anticipate the employee will perform the most overtime. If employers anticipate that the employee will perform the most overtime in the higher paying job, then the standard calculation, while complicated, is the better economic option. If it is in the lower-paying job, the separate rate approach is better. It is important to note that an employer may not switch between the two methods regularly to avoid paying overtime.

Despite the complications inherent in joint employer relationships, such relationships continue to be prevalent in the home healthcare arena. The most common of these relationships occurs when one employer provides employees to perform the work of another employer. While it may be possible to avoid a joint employer relationship by vesting in one employer the right to hire, control, supervise and discipline employees, as well as payroll and benefits administration, such an approach is often impractical. Both employers may want or need to be involved in the day-to-day supervision, direction, and discipline of employees, thereby potentially exposing them to joint employer liability.

In such cases, it may be beneficial to both parties to the relationship to include in their service agreement mutual indemnification provisions, as well as provisions requiring the party responsible for violations to bear the costs of defending against any claims caused by its violations. As the court's decision in *Zachary* makes abundantly clear, an administrative services agreement that limits the amount of control that an entity may exert over another entity's employees may be insufficient to stave off joint employer liability.¹⁸³ Thus, entities entering into relationships that bear an indicium of joint employment are strongly encouraged to insist upon strong indemnification and duty to defend provisions. By ensuring that each party bears the responsibility for its own actions, such agreements encourage each employer to comply with the law while simultaneously protecting them in the event that others fail to do so.

IV. PREPARING FOR THE FUTURE

The wage and hour issues discussed in this article are currently among the most commonly litigated issues affecting home healthcare employers. The industry has now become a target for wage and hour litigation and government investigations, and new issues are constantly emerging. Given the complexity of the issues, the frequency of new developments, the risk of becoming entrapped in expensive and time consuming litigation that may result in costly damages is great. To reduce this risk, employers should proactively analyze their pay practices and policies and seek advice regarding any potential issues. Correcting potential problem areas in pay and timekeeping practices now will go a long way toward decreasing an employer's vulnerability to plaintiffs' counsel looking for the next big wage and hour complaint to file.

179 29 C.F.R. § 778.419(a)(1).

180 29 C.F.R. § 778.419(b).

181 29 C.F.R. § 778.419(a)(2).

182 29 C.F.R. § 778.419(a)(1).

183 471 F. Supp. 2d at 1182.

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