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Health care reform

Analyze workforce now to determine your responsibility under Affordable Care Act

The comments for the proposed IRS rule are in, and experts fear that the requirement to provide affordable health insurance to full-time employees could have devastating effects on the home care industry, causing some agencies to move employees to part time and other agencies to be forced out of business.

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Wage-and-hour law

Beyond the companionship exemption: How to classify employees as non-exempt

By: Angelo Spinola and Marcia Ganz

In light of both pending changes to the companionship exemption and an increase in litigation by caregivers claiming unpaid overtime, agencies are finding it risky to classify caregivers as exempt employees.

The December 2011 proposed rule by the Department of Labor (DOL) threatens to eliminate the companionship exemption for domestic caregivers, making them eligible for minimum wage and overtime payments. The proposed changes would prohibit the use of the exemption by third-party employers, such as home care agencies. The final rule is expected to be released soon.

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Benchmark performance

Measure what matters most — focus on five dials for agency growth

By: Aaron Marcum

Home care owners and executives should focus on approximately five and no more than 10 key performance indicators (KPIs).

Dan Sullivan, founder of Strategic Coach in Rosemont, Ill., refers to those indicators as “The Five Dials.” This is a reference to the fact that pilots have been trained to focus the majority of their attention during flight on five specific dials. The rest are secondary to the successful navigation of an airplane.

So what are “The Five Dials” for home care? The information below walks through them and provides benchmarks for each based on responses from the more than 600 home care agencies that participated in the 2013 Annual Private Duty Benchmarking Study conducted by Home Care Pulse in Rexburg, Idaho.

Dial 1 — Retained earnings

This is perhaps the most overlooked KPI in a home care business. Yet, it represents the lifeblood of any business, large or small. Retained earnings is the portion of your net ordinary income that is kept in the business rather than used to distribute dividends to the owners.

Based on Home Care Pulse’s research, leading agencies (those who bill more than \$2 million a year) set aside approximately 40% or more of their net ordinary income as retained earnings. For example, if an agency’s net ordinary income for April was \$10,000, it might keep \$4,000 in the business as retained earnings. By ensuring that a certain percentage of your net ordinary income is put aside each month in retained earnings, you are increasing your chances to thrive long into the future.

Dial 2 — Sales per full-time employee

Sales per full-time employee (FTE) is a simple way of deciding whether you have too many or too few office support staff who contribute to your overhead cost. To calculate, count the number of office support staff you have and divide it into your annual revenue. Include all active owners, executives, admins, staffing coordinators and field supervisors. Count part-time staff as half of an FTE and don’t include caregivers. If you have 4.5 support staff and your 2012 revenue was \$1 million, your sales per FTE would be \$222,222.

So how does that compare with other agencies? Below is the breakdown of the median sales per FTE dollar figure based upon revenue range as reported in the 2013 Annual Private Duty Benchmarking Report:

- \$0 to 499,000 in revenue: \$125,000 in sales
- \$500 to 999,000 in revenue: \$214,286 in sales
- \$1 to 1.999 million in revenue: \$282,051 in sales
- \$2 million+ in revenue: \$334,700 in sales

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If your sales per FTE are lower than those in your revenue range group by comparison, you may have too much overhead. Look at creating better efficiencies within each key position, and let go of any positions that are not adding enough value.

Dial 3 — Inquiry to admission close ratio

Your inquiry to admission close ratio can reveal how well you and your team are communicating your unique value to prospective clients. It shows the percentage of inquiries that actually become clients of yours. There are two important figures to track to calculate this ratio: 1) The number of inquiries you receive during a period and 2) The number of new admissions or clients you brought on during that same period. To calculate, take the number of admissions and divide it by the number of inquiries in that same month.

The median inquiry to admission ratio for leading agencies (\$2 million+ in revenue) was 40.3%, while the rest of the industry was 30.7%, according to the Home Care Pulse study.

Dial 4 — Caregiver turnover ratio

Clients are happiest and most satisfied when they are being cared for by happy and satisfied caregivers. A low caregiver turnover ratio indicates that your caregivers are happy. The caregiver turnover ratio tells you the percentage of caregivers who have left your company during a given period, whether it's a month or an entire year.

Here are the numbers you need to track in order to calculate it:

- A. Active caregivers at the end of the previous period (i.e. 2012)
- B. Active caregivers at the end of the current period (i.e. 2013)
- C. Terminated/caregivers who quit during that same period

Here's the formula for calculating as recommended by the Department of Labor:

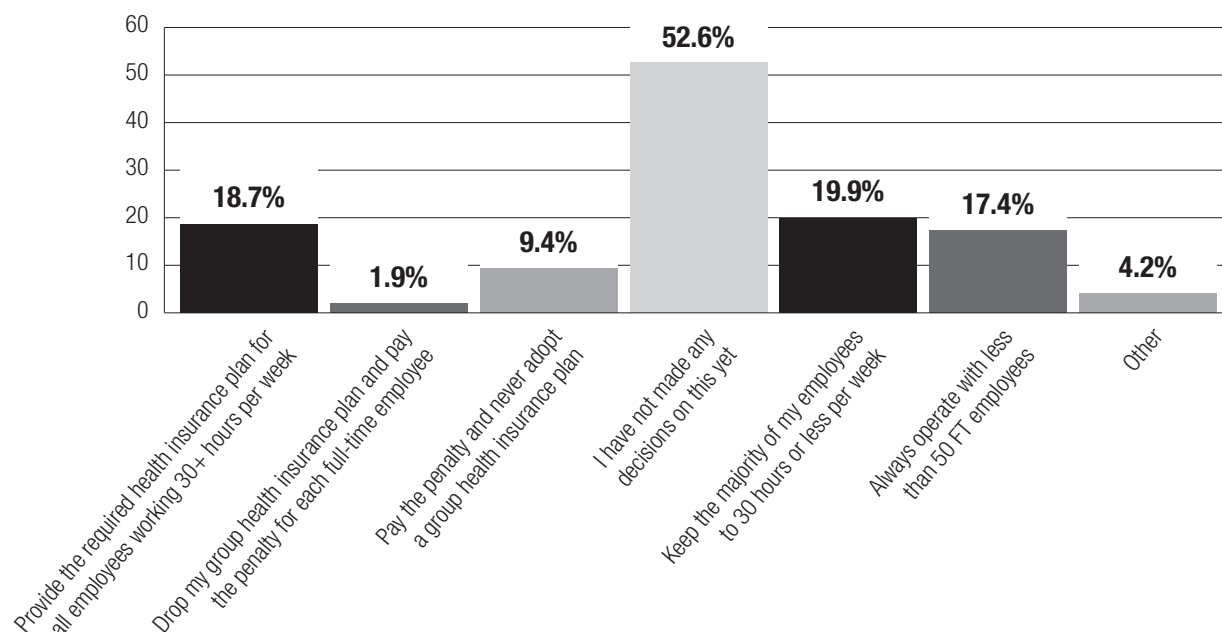
$$\text{Step 1} — (A+B) / 2 = Y$$

$$\text{Step 2} — (C/Y) \times 100 = \text{Caregiver Turnover Ratio}$$

Benchmark

Agencies unsure how to respond to employer insurance mandate

When asked what actions they were planning to take to prepare for the new employer insurance mandate, effective Jan. 1, 2014, private duty agencies had varied responses. Half of agencies are still unclear on how to respond. Another 20% of agencies plan to limit to 30 or less the number of hours that employees work. Agencies selected all that applied. (*See related story, p. 1.*)



Source: The 2013 edition of the Annual Private Duty Benchmarking Study by Home Care Pulse in Rexburg, Idaho.

How does that compare with the industry? The overall median caregiver turnover ratio continues to rise, with the latest overall caregiver turnover ratio being 52.6%. However, home care businesses that have been in operation for 10 years or more have a turnover ratio of 43.1%, which is a more acceptable range to shoot for.

Based on thousands of caregiver interviews as a part of Home Care Pulse's quality management program, 71% said that during the most recent three-month period they placed a higher importance on being recognized for performance than on receiving a pay raise. This reinforces the importance of employee recognition programs as effective ways to reduce turnover rates.

Dial 5 — Client satisfaction management

When asked how to identify the top things that set their agencies apart from others, the top five responses from agencies all related back to providing clients with above-average care and services. Here are the top five answers:

1. High-quality caregivers
2. 24/7 availability
3. Client satisfaction
4. Exceptional customer service
5. Professionalism of agency

Agencies selected these responses from 32 different options, ranging from specializing in dementia care to providing greater affordability.

Capturing and measuring client satisfaction is key to identifying where improvements can be made and who your happy clients are so you know who to ask for referrals. It also can be a powerful tool in strengthening the loyalty among your clients, caregivers and referral sources.

While these aren't the only "dials" you should be tracking as a home care business, you can delegate the majority of other "dials" to the rest of the team and train them to know when it is appropriate to share the results of these "dials" with you. That will allow you to focus the majority of your time and energy in areas that will have the greatest positive impact on the future growth of your business.

About the author: Aaron Marcum is the founder of Home Care Pulse, a quality management firm specializing in capturing and measuring client and caregiver satisfaction for hundreds of home care agencies across the country. Prior to starting Home Care Pulse, Aaron

owned and operated his own private duty home care agency in Salt Lake City. You can reach him and his team at info@homecarepulse.com or (877) 307-8573.

Health care reform

New OSHA rule: Employee complaints about reform violations can cost you

If you retaliate against an employee to avoid penalties under the Affordable Care Act (ACA), you could find yourself stuck with those penalties, an additional compensatory damage award and other costs, under a new interim final rule to protect whistleblowers. (*See related story, p. 1.*)

Starting in 2014, employers with 50 or more full-time equivalent employees that don't provide health coverage considered "affordable" under the law will face a monthly penalty.

And if just one low-income employee decides to seek federally subsidized insurance through a state exchange, your insurance won't meet the definition of "affordable," and you'll have to pay the penalty or increase your share of the coverage premium, says John Gilliland, a partner at The Gilliland Law Firm in Indianapolis, who specializes in provider labor issues.

The monthly penalty would be the lesser of:

- 1/12th of \$3,000 for each full-time employee who receives the taxpayer-assisted coverage; and
- 1/12th of \$2,000 for each full-time employee after the first 30.

Employees will qualify for federally subsidized exchange coverage if premium costs for an employer-provided plan exceed 9.5% of their annual household income.

The penalties accumulate until the coverage satisfies the ACA requirements. But punish the low-income employee, and you also could find yourself the target of administrative proceedings prescribed by the new whistleblower regulation, which the Occupational Safety and Health Administration (OSHA) published Feb. 27. The rule also took effect on that date.

Obvious employer actions that could trigger those whistleblower protections include firing or refusing to hire someone who has sought insurance exchange help or might do so, Gilliland warns. But the protections might also apply to an employer who gives the employee in question the worst patients or the most inconvenient work hours, he notes.

If the employee files a complaint with OSHA and it ends in favor of the employee, you could be forced to reinstate that employee to his or her former position, reimburse for back pay and pay an award of compensatory damages as authorized by the rule.

What you can't do under the new rule

The new interim final whistleblower rule makes it clear that an employer may not fire or otherwise retaliate against the employee who chooses the exchange route, Gilliland notes. As defined in the rule, retaliation includes "intimidating, threatening, restraining, coercing, blacklisting or disciplining, any employee with respect to the employee's compensation, terms, conditions or privileges of employment."

Here is some advice from Gilliland on how to steer clear of violations of the new whistleblower rule:

- **Don't ask employees whether they plan to get taxpayer-assisted coverage.** That could be construed as a violation under the whistleblower rule. You also can expect prohibitions under the rule to extend to questions during interviews with a job applicant.
- **Document warnings to employees carefully in their record** to make sure a subsequent termination isn't construed as a violation under the rule. No matter the true reason for the disciplinary action you took, the employee can blame retaliation. Take, for example, an unsatisfactory employee you intended to fire because of persistent lateness to appointments. Documentation of prior warnings is your best defense in such a case.
- **Make sure management and supervisors are aware of the prohibitions** so they don't unknowingly engage in what appears to be prohibited retaliation under the rule. — *Burt Schorr (burt.schorr@verizon.net)*

Editor's note: See OSHA's new whistleblower rule at: www.gpo.gov/fdsys/pkg/FR-2013-02-27/pdf/2013-04329.pdf.

Marketing strategies

Maximize media relationships to stay ahead of competition, boost referrals

Media-savvy private duty agencies are forming relationships with their local TV and radio stations and newspapers to gain exposure and outdo competitors.

Just three to four months after striking a deal with a local media organization, the agency Mike Belusko was working with had a nearly 50% increase in inquiries and

nearly all of them were converted into admissions. "The phone was ringing so much that the company decided to downsize the sales team," says Belusko, who is now the acting administrator for Classic Home Health Care in Fairview Park, Ohio.

He shifted funds from sales to advertising, investing in a television ad campaign. As part of the deal, TV studio staff wrote a script for the commercial and hired a cast of volunteer actors from a local theater to play the smiling caregiver, happy family members and content elderly person receiving care. Belusko also insisted that the relationship with the TV station be reciprocal, and the agency became a go-to source whenever a TV news segment required an expert on aging, elder care or the effects of Obamacare. He said 35 commercials during prime spots cost around \$3,000.

Agencies that are invested in their sales teams, attending local Chamber of Commerce meetings and networking with community organizations should take note of this approach. They may not realize the "benefits that can be attained by maximizing their use of the media," Belusko advises.

It's not a 'spray and pray' method

In the past five years, Family & Nursing Care in Silver Spring, Md., has hired a marketing and communications manager to join the agency's 50 office workers and 1,000 nursing assistants, says President Neal Kursban.

Kursban was skeptical about whether the new employee's media outreach would have much effect, but her work developing relationships has positioned himself and his top-level employees as experts who are often called upon by local media outlets for anything related to private duty home care.

The agency's marketing and communications manager has many other job duties and spends only about 15% of her time on media outreach. But it's had a noticeable effect, with a 12% increase in 2012 of both calls from family members after media exposure and referrals from health care professionals, Kursban says.

But developing those relationships takes time. It's not a "spray and pray" method, he says, meaning sending out a pile of press releases will not likely have much effect.

"We found that you have to help the press tell their story, and part of that comes with researching the individual reporter," Kursban explains. "Find out what reporters like to write about, and come up with a story that they'll want to cover."

How to get your foot in the door

• **Learn about the local media and their interests.** “They’re looking for a departure from the norm,” says Merrily Orsini, CEO of Corecubed, a home care consulting company in Louisville, Ky. Do you have a client who is exceptionally old? A war hero? Someone who beat the odds? A caregiver with an amazing life story?

• **Get to know the reporters.** “Nothing can replace a face-to-face meeting,” says Chicago-area media expert Jennifer Martinez. Belusko has invited the media to come to the office, meet with the staff and meet clients (who provided written consent in advance).

• **Don’t be afraid to ask** for coverage or an opportunity to be an expert — particularly if you’re spending money advertising with that media outlet, Belusko reasons. “Any kind of business relationship you get into with the media should be reciprocal.”

• **Learn how to brag.** “In our profession, we’re in the business of helping people, and we do it without expecting anything in return,” Belusko says. “All of a sudden, with the media, you have to tell people how good you are at caring, and it really does feel off.”

• **Adjust for campaigns and other seasonal events.** Start campaigns after political seasons when “media advertising becomes leaner,” Belusko advises. Carefully record inquiries after the beginning of the campaign, and adjust commercial run times based on the volume and quality of calls.

• **Embrace Twitter.** Reporters receive so many emails in a given day that they’re more likely to notice

— and consider — a succinct, 140-character story pitch sent to them via Twitter, says Martinez.

• **Be prepared to give the media access for an article.** If reporters respond to an idea involving a client, they’ll want to interview the caregiver, client and family members and take photos or video, says Belusko. Obtain written permissions before making the pitch and make sure everyone is on board. — *Angela Childers* (angela.childers@gmail.com)

Medicaid

AARP study on HCBS helps one state earn additional funds

AARP has compiled 38 studies from states that evaluated publicly funded home and community-based services (HCBS) programs, and for one state the report has successfully increased funding by millions.

But while the compilation of reports shows that HCBS can save money when compared with nursing home costs, other industry stakeholders aren’t sure it will be enough to move the needle for increased access to care on a national basis.

Nevertheless, staff members from AARP and the Denver Regional Council of Governments credit the AARP compilation with helping them successfully advocate for an additional \$4 million in non-Medicaid spending for senior services in the 2014 fiscal year. As a result, about 1,000 more elderly people will be able receive services ranging

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from home-delivered meals to rides to the doctor and grocery store to receiving dental, vision and hearing services, says Rich Mauro, who works in policy and legislation for the regional council of governments and focuses heavily on aging issues. The AARP review helped Colorado lawmakers see that HCBS programs are cost-effective.

Still, Medicaid experts from other states, such as California, believe that funding would have to drastically increase in order to improve access to services, says Dean Chalios, president of the California Association for Health Services at Home.

Additional funds are still needed

Colorado has \$12 million in funds slated to be available next fiscal year, says Kelli Fritts, an associate state director with AARP Colorado. However, a statewide assessment showed a need for \$55 million in 2004 and that the need was expected to grow to \$158 million in 2020.

Although the review involved Medicaid and Fritts is seeking funds for non-Medicaid spending, she says the review was highly useful because Colorado has highly restrictive tax and spending limitations.

“With this report we can say, ‘Yes, we can save the taxpayers money,’” she says.

AARP seeks to move the needle

The AARP compilation includes state studies published from 2005 to 2012. It evaluates the cost-effectiveness of HCBS and supports efforts to push resources to HCBS as opposed to institutional care.

AARP’s hope is that states will allocate a greater proportion of their Medicaid budget toward HCBS programs since people prefer to live at home, says Wendy Fox-Grage, senior strategic policy advisor for AARP.

The state studies compiled by the AARP consistently find lower average costs per person for HCBS compared with institutional care.

Fox-Grage spent two years compiling state studies. AARP was able to determine 25 states that had published studies; nine had published multiple studies. Some of the studies were state-sponsored while others were from external sources.

In addition to showing costs are lower for HCBS programs than for nursing home care, the AARP compilation also showed that people would prefer to have services at home as opposed to a nursing home.

The hope is that with extra funding, options will be expanded and the waiting lists for home and community-based services — which some states have — will be eliminated, she says. — *Josh Poltilove* (jpoltilove@decisionhealth.com)

Editor’s note: To view AARP’s study, visit: www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/state-studies-find-hcbs-cost-effective-spotlight-AARP-ppi-ltc.pdf.

Analyze workforce for ACA impact

(continued from p. 1)

In its comments on the proposed IRS rule, the National Association for Home Care & Hospice recently asked for review of the “severe unintended consequences for millions of elderly and disabled that depend on home care services” that the regulation could create because of the steep penalties. Those penalties will be imposed on home care agencies that are unable or unwilling to provide health insurance that meets the standards set under the Affordable Care Act (ACA).

Just 18.7% of non-medical home care agencies expect to provide the required health insurance plans to all employees working 30+ hours a week and about 10% of agencies plan to pay the penalty, according to results from the 2013 Annual Private Duty Benchmarking Study conducted by Home Care Pulse in Rexburg, Idaho. The more popular option for 19.9% of agencies is to limit the number of hours that employees work to less than 30 hours per week. *(See box, p. 3, for a complete rundown of how agencies plan to respond to this requirement.)*

The proposed rule requires employers with more than 50 employees who work 30 hours or more a week to provide insurance that costs employees no more than 9.5% of their household income — and meets government criteria — or face annual penalties ranging from \$2,000 to \$3,000 per employee if employees seek subsidized policies through a federal or state health exchange.

“In my experience, a policy like that will cost agencies more than the cost of the penalty,” explains Bob King, the founder of Legally Nanny, a law firm in Irvine, Calif., that specializes in home care. If the IRS rule stays as is, private duty agencies will be forced to seriously consider either moving all home care aides to part time or consider the registry model, he adds.

For those who choose not to offer health benefits, mid-size agencies with more than 50 full-time equivalent employees will likely take the biggest hit, because they have less capability to absorb the fines, King says. Large agencies are better equipped to take a \$60,000 to \$80,000 hit, he explains.

Medicaid agencies to suffer most

One agency that's at risk for going out of business as a result of this requirement is Helping Hands in Home Care in Prescott, Ariz., fears owner Karen Armstrong. Her workforce is hovering too close for comfort to the 50 full-time equivalent magic number that triggers penalties. She currently employs about 250 workers; about 45 would be considered full time under the law. "We simply cannot afford to pay for our full-time employees' health care benefits, nor can we afford the penalties for not providing insurance," she relates.

Although Helping Hands has a mix of private pay and Medicaid waiver clients, Armstrong says the dwindling Medicaid reimbursement rate of \$13.97 per hour for elderly care — plus the 10% that has to be given to the middleman handling the state's Medicaid contracts — has made it tough to even pay caregivers. Her only solution to the problem right now is to move more employees to part time and ensure that no part-time aides work more than 29 hours in any week, she says.

Home care agencies solely compensated through Medicaid will have trouble staying afloat, fears Bill Broydrick of Broydrick & Associates, a lobbyist group representing the interests of 17 Medicaid-dependent providers of home care in the Midwest.

"For someone who is Medicaid-dependent, there really is no way to pay the fine or to pay for health insurance. So that will lead inevitably to the inability of them to continue to exist," Broydrick says.

For large franchise agencies like Visiting Angels, each individual franchisee — not the franchisor — is responsible for complying with the ACA or paying the fines, because locations are individually owned, says Pat Drea, chief operating officer of Visiting Angels in Havertown, Pa.

Prepare for the ACA now

While the proposed rule has yet to be finalized and implemented, King warns the time to start evaluating your workforce and options is now. Private duty agencies are urged to:

- **Calculate each employee's full-time status.**

Under the proposed IRS rule, the number of employees considered full time for ACA purposes will be determined using 2013 figures, even though the proposed rule will not take effect until 2014. Sue Emery, an employee benefit consultant and the regional director of media for the National Association of Health Underwriters, says the rules provide that employers may determine whether employees who work variable hours averaged 30 hours per week to be considered full time during a "transition measurement period." The rule stipulates that this period is between six and 12 months long, and that it commences no later than July 1, 2013, and ends no earlier than 90 days before the first day of the health plan year beginning on or after Jan. 1, 2014.

- **Price out the cost of providing coverage versus the cost of the penalties.** "Immediately contact an insurance agency, and get a quote on a policy that complies with the ACA and compare what it would cost to offer this insurance versus what the penalties will be," King recommends.

- **Consider a few different scenarios, and get experts involved in your decision-making.** Emery advises that if your agency is seriously considering providing benefits but is worried about meeting that 9.5% of household income threshold for a handful of employees, consider how many of those \$3,000 penalties for unaffordability will be incurred versus going with a more expensive plan or foregoing insurance altogether. She also urges private pay agencies to consult with an accountant and attorney "to see if they are walking on the edge" of ACA compliance.

- **Focus on private pay.** Broydrick says home care companies that receive Medicaid funding will need to try to gain more private pay clients and expand that client base to survive the ACA penalties. — *Angela Childers (angela.childers@gmail.com)*

Editor's note: Since the Jan. 2 posting of the proposed IRS rule, "Shared Responsibility for Employers Regarding Health Coverage" (REG-138006-12), nearly 500 comments from employers, lobbyists, trade associations and others have flooded the government's regulations site. To view the rule and the comments, go to www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0001.

Beyond the companionship exemption

(continued from p. 1)

In addition, there has been an increase in class and collective action lawsuits in which plaintiffs allege they do not qualify for the exemption and should have been paid overtime for hours worked over 40 in a workweek. The basis for these caregivers' claims is that they spend more than 20% of their time performing general housework and other work unrelated to patient treatment, such as shopping, washing laundry and cleaning for the entire household. These cases require extensive discovery regarding what activities the caregivers have been performing, resulting in expensive and time-consuming litigation.

For purposes of the exemption, the current regulation, 29 C.F.R. section 552.6, defines "companionship services" to include "household work related to the care of the [client]." To qualify for the exemption, an employee must not perform *general* household work for more than 20% of the "total weekly hours worked."

Risks when classifying employees

Given all of these developments, home care employers should consider whether to reclassify caregivers as non-exempt employees subject to the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA). In making this decision, employers must understand the nature and extent of oversight that is required to ensure that minimum wage and overtime are properly paid to non-exempt employees.

The claims most commonly asserted in class actions by non-exempt home care employees 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 or unpaid time spent traveling between patient homes. Depending on the type of work, different rules and best practices will apply.

This article provides best practices related to non-exempt employee meal periods. Issues related to travel time and activities performed outside of scheduled working hours will be addressed as a continuation of this article in an upcoming issue of *Private Duty Insider*.

Comply with meal period requirements

The FLSA does not contain a requirement for employers to provide meal periods. However, many state laws dictate this. Although state laws vary, typically an employer must provide an unpaid meal period of a

certain length after a specified period of work time. For example, states may require a 30-minute uninterrupted meal period after five hours of work.

Beyond the time requirements, states also have different approaches to the extent of the employer's responsibility to provide meal periods. The extent to which an

Pending companionship rule has stirred fierce pro and con lobbying

State Medicaid directors and disability rights groups are at loggerheads over the pending federal regulation that would extend federal minimum wage and overtime pay to in-home health care workers

In an April 8 letter to the Office of Management and Budget, which now is reviewing the final regulation crafted by CMS, the National Association of Medicaid Directors warned that the proposal could disrupt complex and long-standing care arrangements for low-income people, particularly when friends or relatives are the caretakers. New cost estimates are needed because the potential impact is "just huge," Matt Salo, the association's executive director told the newsletter *CQ HealthBeat*.

Advocates for the proposed Department of Labor rule still are preparing their counter-plea response, but intend to request favorable action by the Obama administration. The press conference they're planning will feature Bruce Vladeck, head of the Medicare and Medicaid programs during the Clinton administration.

The dispute reflects a problem for federal regulators, who must balance President Barack Obama's pledge to the workers with the possibility that costs could rise even further for the state-federal Medicaid program. Home care workers often provide services like bathing, fixing meals or shopping for groceries under state-designed and Medicaid-funded programs for poor people.

Worker advocates argue it's not acceptable to cancel wage and overtime pay protection.

Steve Edelstein, national policy director for PHI, a group that advocates for in-home workers, says the latest DOL proposal drew more than 20,000 comments in 2012, three-quarters of them in favor and "OMB is actively considering it."

White House records show that throughout March, OMB and Labor Department officials met with groups for and against the proposal, including the American Federation of State, County and Municipal Employees union, which supports the rule, *CQ HealthBeat* reported. Opposed advocacy groups include Interfaith Worker Justice, the Latino Union of Chicago and the Direct Care Alliance, AARP and home care staffing agencies and trade organizations.

— Burt Schorr (burt.schorr@verizon.net)

employee is relieved of all duties during meal periods and whether employees are free to leave the employer's premises are two issues that must be considered when seeking to comply with applicable state law. (*For a sample meal break policy, see insert.*)

In some states, an employee may waive the right to the meal period under certain circumstances. If an employee and employer choose that option, employers are well-advised to document the availability of meal periods and should use a written waiver form voluntarily signed by the employee.

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."

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. Factors that courts may consider include restrictions placed on the employee during the meal period and whether such restrictions benefit the employer. For example, requiring employees to stay at their work station in case of need could be construed as benefiting the employer. Other factors considered include the employee's duties during the meal period and the frequency of interruptions.

Home care employers also should consider whether the convenience of using automatic-deduction payroll systems outweigh the risks of class-wide litigation. Agencies have faced a wave of class action litigation in which employees claimed they worked during meal periods that were automatically deducted from their pay.

Courts have generally held that automatic meal break deduction policies are not necessarily unlawful, and that liability depends on whether employees were required to or did work during unpaid meal periods. Because of the individualized determinations required, many courts have concluded that these types of cases are not amenable to class treatment — particularly when the employer has a timekeeping system or policy that allows employees to override the automatic deduction. However, even when class claims are dismissed, the dismissal usually occurs after costly and prolonged litigation, and individual claims may still remain and create liability for the employer.

Minimize the risk of unpaid work

Employers can take additional steps to minimize claims of unpaid work time based on missed or interrupted meal periods. Consider the following:

- **Require employees to record all meal periods** including start and stop times, whether they use paper or electronic systems to record their time.
- **Require employees to certify whether they received an uninterrupted 30-minute consecutive meal period** as part of their hours-of-work submission process. For example, the employee's timesheet may include language acknowledging that they have recorded all time worked and/or have taken all meal periods in full or as indicated otherwise along with a space for the employee's signature, certifying their time worked.
- **Provide a mechanism for employees to report missed and interrupted meal periods** and a method to pay any extra compensation that may be due.
- **Consider whether the employer's state allows for meal period waivers** and whether they may be appropriate for employees.
- **Conduct periodic audits of time records** to ensure that employees are recording meal periods and are doing so properly.

Note: For more guidance on how to avoid risks related to the compensability of travel time and activities performed outside of scheduled work hours, see upcoming issues of *Private Duty Insider*.

About the authors: Angelo Spinola is a shareholder and Marcia Ganz is an associate in the Atlanta office of Littler Mendelson, the world's largest employment and labor law firm exclusively devoted to representing management. Their practice is focused on defending employers in regards to wage-and-hour litigation and compliance issues. They both have significant experience counseling clients in the home health care industry.

Limit liability when using independent contractors

With the threat of the removal of the companionship exemption, agencies are turning to independent contractors as a way to reduce minimum wage and overtime liability. But with that move comes a wealth of tax and labor risks for agencies who aren't familiar with the nuances of the law. Minimize your risk by purchasing *PD*'s 60-minute training webinar titled "Limit liability when using independent contractors." To order visit: www.decisionhealth.com and search for "Limit liability."

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