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Recent Wage & Hour Challenges and Solutions for Home Health Care Employers

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The number and sophistication of wage and hour claims brought against employers in the health care industry has increased dramatically in recent years. This is particularly true with respect to claims brought against home health care employers, with many of these legal actions being filed as class and collective actions on behalf of thousands of employees. This expensive and time-consuming litigation includes cases involving exempt as well as nonexempt employees under the federal Fair Labor Standards Act (FLSA) and state wage and hour laws, and involving a variety of positions in the home health care industry. For these reasons, it is important for home health care employers to identify high-risk practices and positions that may exist in their workforce that are commonly the target of litigation, and to implement a plan to mitigate the legal risks.

Misclassification of Home Health Care Workers

Applicability of the Companionship Exemption

Since 1974, the FLSA has excluded from its coverage ''any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves.''[1] In the past, 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 these workers.[2]

However, a new rule proposed by the DOL on Dec. 15, 2011,[3] threatens to eliminate the exemption for domestic caregivers, making them eligible for minimum wage and overtime payments. The DOL has proposed changes to the companionship exemption that would narrowly define the types of tasks that may be performed by exempt companions, and limit the exemption to companions employed directly by the individual, family, or household using the services. Specifically, the proposed regulation would prohibit the use of the exemption by third-party employers, such as home health care agencies.[4] The DOL has twice extended the comment period, most recently with a deadline of March 21, 2012. Since this deadline, no further updates have been announced.

The current regulation defines ''companionship services'' to include ''household work related to the care of the [patient]'' and to exclude ''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.''[5] The DOL also said that the 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.''[6]

The question of what qualifies as ''general household work'' was at issue in *Anglin v. Maxim Healthcare Services Inc.*, a case in which the plaintiff was a certified nursing assistant who argued that, because she spent more than 20 percent of her time performing general housework and other work unrelated to patient treat-

[1] 29 U.S.C. § 213(a)(15); *see also* 29 C.F.R. § 552.6.

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[2] *See, e.g., Long Island Care at Home Ltd. v. Coke*, 551 U.S. 158 (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 Servs. Div.*, 894 F.2d 1107, 1109-10 (9th Cir. 1990); *Toth v. Green River Reg'l Mental Health/Mental Retardation Bd. Inc.*, 753 F. Supp. 216, 217-18 (W.D. Ky. 1989); *Sandt v. Holden*, 698 F. Supp. 64, 67-68 (M.D. Pa. 1988).

[3] Application of the Fair Labor Standards Act to Domestic Service, 76 Fed. Reg. 248 (proposed Dec. 27, 2011) (to be codified at 29 C.F.R. § 552), http://www.gpo.gov/fdsys/pkg/FR-2011-12-27/pdf/2011-32657.pdf.

[4] *Id.* at 81198.

[5] 29 C.F.R. § 552.6.

[6] *Id.*

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ment, she did not qualify for the exemption and should have been paid overtime for hours worked over 40 in a workweek.[7] In *Anglin*, the court denied summary judgment to the employer, which had argued that the plaintiff was exempt from overtime under the health care 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. 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.[8] Following a bench trial, the court ultimately found that the plaintiff had not provided sufficient, credible testimony to support her claim that she spent more than 20 percent of her time performing general household activities.[9] This result, however, came only after expensive and time-consuming litigation.

Applicability of the Professional Exemption

The learned professional exemption is another exemption from minimum wage and overtime requirements under the FLSA and many state laws that is commonly applied to home health care employees, such as registered nurses and other similar health care employees.[10] To qualify for this exemption under the FLSA, employee positions must satisfy requirements as to both the duties performed and the compensation paid.[11]

The Duties Test

Under the duties requirement of the professional exemption, an employee's primary job duty must involve (1) work requiring advanced knowledge (2) in a field of science or learning (3) that must be customarily acquired by a prolonged course of specialized intellectual instruction.[12] Under the DOL regulations, medicine is enumerated as a ''field of science or learning''[13] and the possession of an academic degree is *prime facie* evidence of specialized instruction.[14]

The regulations also specify categories of occupations within medicine that generally are exempt, as long as they meet the requisite degree or license requirements enumerated in the applicable regulations.[15] These occupations include registered or certified medical technologists,[16] registered nurses,[17] and physician assistants,[18] and specifically exclude licensed practical nurses and ''other similar health care employees.''[19]

Still, having the requisite degree or license is not enough to satisfy the professional exemption.[20] The employee's *primary duty* must involve specific work that requires advanced knowledge.[21] For example, although courts have generally found registered nurses satisfy the duties test for the professional exemption,[22] nurses performing nontraditional nursing duties, such as case-management functions or administrative tasks, have nevertheless challenged their exempt classification.[23]

For instance, in *Powell v. American Red Cross*,[24] a registered nurse who was a ''wellness associate'' (also known as 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 and consulting on medical issues that arose while personnel were abroad. In addition to these duties, the plaintiff's job responsibilities included, among other things, filing worker's compensation claims; health education and counseling; 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 the files.[25] Although the plaintiff's work included some routine administrative tasks, the court ultimately concluded she 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 the nurse's workdays.[26]

More recently, in *Rieve v. Coventry Health Care Inc.*,[27] registered nurses employed as field case manag-

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[7] *Anglin*, 2009 U.S. LEXIS 70155, at *2.

[8] *Id*. at *24.

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

[10] In certain circumstances, where an employee's primary duties are related to management and other requirements of the exemption are met, home health care employers have classified employees under the executive exemption. *See Goff v. Bayada Nurses Inc.*, 424 F. Supp. 2d 816 (E.D. Pa. 2006) (''The employee's statements demonstrated that her primary duty was management, as she was responsible for a client caseload and for scheduling staff and performed various management functions. She regularly directed at least two staff members; she was involved in recruitment, hiring, and termination of staff; and she used discretion and independent judgment in scheduling staff.'').

[11] 29 C.F.R. § 541.301.

[12] 29 C.F.R. § 541.301(a)(1)-(3).

[13] 29 C.F.R. § 541.301(c).

[14] 29 C.F.R. § 541.301(d).

[15] 29 C.F.R. § 541.301 (e).

[16] 29 C.F.R. § 541.301(e)(1).

[17] 29 C.F.R. § 541.301(e)(2).

[18] 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 in 29 C.F.R. § 541.304).

[19] 29 C.F.R. § 541.301(e)(2).

[20] *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).

[21] *Id*. at *14.

[22] *Id.* at *19 (''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 [*20] deemed a professional exempt from FLSA coverage.'').

[23] *See, e.g.* Rieve, 2012 U.S. Dist. LEXIS 58603 (field case managers); *Withrow v. Sedgwick Claims Mgmt. Serv., Inc.*, 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).

[24] 518 F. Supp. 2d at 40.

[25] *Id.* at 28.

[26] *Id*. at 43.

[27] 2012 U.S. Dist. LEXIS 58603 (C.D. Cal. Apr. 25, 2012).

  HLR ISSN 1064-2137

ers (FCMs) for a company that provided workers' compensation medical and case management services to insurers and employers challenged their professional exemption classification. Although they were not engaged in direct patient care, the nurses monitored and reported whether patients received medical care according to physician orders.[28] 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.''[29] 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 facilitate recovery.''[30] Based on the facts of the case, the court upheld the exemption, finding that the primary job duties of the nurses required the application of advanced knowledge, judgment, and discretion.

To decrease the risk of misclassifying home health care employees as exempt professionals based on the duties they perform, employers should avoid the assumption that possession of a degree or professional certification automatically qualifies an employee for the professional exemption; rather, employers should consider the actual job duties of the employee. In addition, to the extent possible, employers should limit the percentage of nonexempt work done by exempt employees and make sure 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.

The Compensation Test

As mentioned, in addition to the duties test of the professional exemption, the manner and amount of compensation paid to the employee must meet the requirements of the exemption. Over the last few years, the employer's method of compensation has become the most significant challenge in satisfying the requirements of the professional exemption for home health care employees. Compensation methods commonly used in the industry have become a target for plaintiffs' counsel seeking to create potential class and collective action lawsuits based on novel issues, the legality of which have not previously been adjudicated.

To be classified as an exempt professional under the FLSA, an employee must be compensated either on a salary basis[31] of not less than $455 per week, which cannot be reduced because of variations in quality or quantity of work, or on a fee basis[32] if the employee is paid an agreed-upon sum for each unique task regardless of the time required for its completion and earns at least $455 in fees projected over a 40-hour week. Nurses and most other home health care employees do not fall within the special medical occupation exception to the salary basis requirement for exemption from overtime and, therefore, like all other exempt employees, they must be compensated on a ''salary or fee basis'' to qualify for the professional exemption.[33]

There are several ways that the compensation requirement can jeopardize the exemption. For instance, in *Bongat v. Fairview Nursing Care Center, Inc.*,[34] the employer lost the professional exemption when it stated that registered nurses were paid at a fixed salary, but the time cards, payroll stubs, and checks established that their pay varied depending on hours worked. In that case, the employer had 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 of payment,[35] the evidence demonstrated that the nurses were not salaried since their pay fluctuated with variations in the quantity of work performed.

The most recent hot issue in litigation is the common practice in the industry of paying home health clinicians on a ''per-visit'' basis, where 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.''[36] 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.''[37] Whether the compensation is paid for a ''unique'' job in

[28] *Id.* at *6.
[29] *Id.* at *7.
[30] *Id.* at **17 -18.

[31] 29 C.F.R. § 541.600(a).
[32] 29 C.F.R. § 541.605.
[33] The ''medical exemption'' from the salary basis test for purposes of the FLSA exemptions, which states that payment on a salary or fee basis is not a requisite to bona fide professional employee status in the case of ''employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof,'' does not apply to nurses and other home health care employees. 29 C.F.R. §§ 541.304(d), 541.600(e) (''in the case of medical occupations, the exception from the salary or fee requirement does not apply to . . . nurses); *Brock v. Superior Care Inc.*, 840 F.2d 1054, 1061 (2d Cir. 1988) (holding that nurses who are not paid on a salary or fee basis do not come within the ambit of the professional employee exception); *Harrison v. Washington Hosp. Ctr.*, 1979 U.S. Dist. LEXIS 10063, at *8 (D.D.C. Aug. 31, 1979) (holding that registered nurses do not hold licenses for the practice of medicine and, thus, do not fit within the exemption for persons engaged in the ''practice of law or medicine'').
[34] 341 F. Supp. 2d 181, 185 (E.D.N.Y. 2004).
[35] 29 C.F.R. § 541.604(a); *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).
[36] 29 C.F.R. § 541.605(a).
[37] 29 C.F.R. § 541.605(a).

the home health industry has been the subject of litigation.

For example, in *Fazekas v. The Cleveland Clinic Foundation Health Care Ventures Inc.*, a group of registered nurses who performed home health care 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.[38] During home health care visits, the nurses treated patients, devised a health care protocol, updated the patient and the patient's family regarding the patient's condition, and, at times, supervised the home health care visits made by licensed practical nurses.[39] The Cleveland Clinic Foundation Health Care Ventures Inc. (''CFF'') compensated the nurses on a per-visit basis, regardless of the number of hours they worked.[40]

The nurses contended that CFF's per-visit compensation program did not qualify as payment on a ''salary or fee basis.''[41] Addressing this argument, the court first concluded that CFF 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).[42] Furthermore, the court—relying primarily on a 1992 opinion letter from the DOL—went on to find that the nurses performed ''unique'' tasks during each home health care visit.[43] 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 advanced knowledge and exercising discretion, but they also were compensated on a fee basis because CFF paid them an agreed sum for the completion of each ''unique'' job, regardless of the hours spent.[44]

Two years later, in *Elwell v. University Hospitals Home Care Services*, the Sixth Circuit again addressed satisfaction of the ''fee basis'' requirement where home health care employees were paid on a per-visit basis.[45] Like CFF, University Hospitals Home Care Services (''University'') paid home health care nurses a predetermined rate per visit for most types of visits.[46] However, unlike the CFF, University paid home health care nurses additional hourly pay for staff meetings, in-service training, on-call duty, and infusion visits that lasted longer than two hours.[47]

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).[48] 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.''[49] The court held that registered nurses performing home health care services who were compensated on both a per-visit and hourly basis did not fall within the professional exemption.[50] 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.''[51] Notably, the court distinguished *Fazekas* based on the fact that the home health care nurses in that case were compensated solely on a fee basis and did not receive hourly payments for any of their duties.[52] Consequently, in *Elwell*, the court held that the professional exemption did not apply because home health care nurses in that case were not compensated on a ''salary or fee basis.''[53]

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 nonvisit time is compensated on something other than an hourly basis. For example, in *Rindfleisch v. Gentiva Health Services*,[54] certain exempt clinicians were compensated for nonvisit 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 nonvisit time took the duration of the activity into account but was not based entirely on time spent. This case has been conditionally certified as a collective action under the FLSA and is currently pending.

As plaintiffs' employment lawyers have increased their focus on various aspects of compensation for exempt professional home health care employees, in addition to the duties and types of activities they perform, employers should 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, if employees are paid on a per-visit or similar fee basis, to limit legal risk, employers should avoid including fee components that directly tie compensation to the number of hours or days worked.

Wage and Hour Issues Affecting Nonexempt Employees

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.''[55] 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.[56] As stated in the DOL regulations, an employer ''cannot sit back and accept the benefits'' of work per-

[38] 204 F.3d 673, 676 (6th Cir. 2000).
[39] *Id.* at 674.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 678.
[44] *Id.* at 679. It should be noted, however, that 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)).
[45] 276 F.3d 832, 840 (6th Cir. 2002).
[46] *Id.* at 835.
[47] *Id.* at 837.
[48] *Id.* at 838.
[49] *Id.*
[50] *Id.* at 840.
[51] *Id.* at 838.
[52] *Id.* at 840.
[53] *Id.*
[54] Civil Case No. 1:10-cv-3288-SCJ (N.D. Ga. May 10, 2010).
[55] 29 U.S.C. § 203(g).
[56] 29 C.F.R. §§ 785.11, 785.12.

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formed by its employees.[57] 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.[58]

To provide some limits on the broad definition of work, Congress enacted the Portal-to-Portal Act in 1947. The Act excluded certain activities from the definition of work, specifically, activities that are ''preliminary'' or ''postliminary'' to the employee's ''principal'' activities.[59] The Supreme Court, however, has held that such activities are still compensable if they are ''an integral and indispensable part of the principal activities.''[60] In turn, ''integral and indispensable'' activities are ''necessary to the principal work performed and done for the benefit of the employer.''[61]

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 health care context, although patient care activities would be considered ''principal'' activities, there are a number of other activities that often occur at the beginning or end of the workday that a court may consider ''integral and indispensable'' and therefore compensable. For example, compensable work generally includes: (1) paperwork or charting that is 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.[62] If nonexempt employees are not instructed to record all of this time and provided an avenue to do so, employers may be faced with wage and hour claims.

Further, the FLSA's assumption that the employer must ''control'' the work is particularly challenging for employers, such as home health care 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 health care industry.[63]

There are several key recommendations for employers to minimize the risk of claims for uncompensated or ''off-the-clock'' work. First, nonexempt employees must be paid for all hours worked. Accordingly, policies should require that all work time be recorded, and employers should inform employees that they may be subject to discipline for failure to follow these policies. Home health care employers should consider specifically listing the various types of activities for which time should be recorded to provide the employees with a clear understanding of what activities constitute work. This is particularly true for employers paying nonexempt 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.

Second, whether a nonexempt employee is paid on an hourly or per-visit basis, the employee must be paid overtime. Overtime will be owed once the employee has worked a certain threshold of hours, generally 40 hours per week under the FLSA.[64] *All* work hours must be counted toward the overtime threshold. Employers should also confirm that they are calculating overtime correctly. In general, overtime must be paid to nonexempt employees at one-and-one-half times the employee's regular rate of pay.[65] 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 the applicable law.

Third, employers must ensure compliance with minimum wage requirements.[66] 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 applicable state law, and pay whichever is more favorable to the employee.

Meal Breaks and Automatic Meal Period Deductions

The FLSA does not require employers to provide meal periods to employees. However, many state laws do require meal periods. Although the specifics vary by state, typically an employer must provide an unpaid meal period of a certain length within a defined number of working hours (such as a 30-minute, duty-free meal period every five hours).

If a meal period is provided, as may be required by state law or employer policy, the meal period should be at least 30 minutes in duration to qualify as a bona fide meal period under the FLSA, and the employee should be ''completely relieved from duty.''[67] To determine whether 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.[68]

Health care employers have faced a wave of class action litigation in which employees claim they worked during meal periods that were automatically deducted from pay. Plaintiffs' attorneys have brought these types

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[57] 29 C.F.R. § 785.13.

[58] *Id.*

[59] 29 U.S.C. § 254.

[60] *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

[61] *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).

[62] *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).

[63] *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 Servs., 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. Gelhomecare, Inc.*, Case No. 11-80003-CIV-MARRA (S.D. Fla. Jan. 3, 2011).

[64] 29 U.S.C. § 207(a)(1). Some states have more stringent requirements. For example, California requires that nonexempt employees be paid overtime if they work more than eight hours per day. Cal. Lab. Code § 510; California Dept. of Indus. Relations, IWC Order 4-2001 sec. 3.

[65] 29 U.S.C. § 207(a)(1).

[66] 29 U.S.C. § 206.

[67] 29 C.F.R. § 785.19(a).

[68] *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 Engl. Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997); *Henson v. Pulaski County 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).

of claims against large health care systems that include home health care agencies.[69]

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 the judge 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.[70] On the other hand, the court dismissed the class claims because, although the complaint alleged that all employees were subject to the meal deduction policy, there was an insufficient basis to infer that all the employees worked during unpaid meal periods.[71]

These types of cases illustrate the risk of costly and prolonged litigation that health care institutions, including home care agencies, may face as a result of timekeeping systems that provide for automatic deductions of meal periods. To minimize these risks, home health care employers should consider, as part of their time sheet submission process, asking employees to certify whether they received an uninterrupted meal period. Employers should also provide a reporting mechanism for missed and interrupted meal periods and have a process for paying for the same. In some cases, meal break waivers may be appropriate.[72]

Travel Time

Under the Portal-to-Portal Act, 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 home at the end of the day.[73]

There are significant exceptions to this rule, however, which are especially pertinent for home health care agencies. 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.[74] In addition, travel time between job sites or patient homes generally is compensable.[75] The failure to include travel time in hours worked can result in overtime and minimum wage liability. For example, a group of home health care 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. [76] The case settled for $2.2 million.

To reduce the risk of liability for failure to pay employees for patient-to-patient travel time, home health care employers should take some basic precautions. First, the travel time between patient visits should be considered hours worked, and should be paid accordingly, either as straight time or overtime. Second, compensable travel time should also be counted when determining whether the minimum wage obligation has been met. To assist with this process and minimize liability under the continuous workday rule, it is recommended that homecare health employers establish and enforce policies that define the workday and prohibit work from home. Further, to the extent that limited work is permitted at the employee's home, the employer should have a mechanism to record this time and specifically state in its policy that such work from home need not occur immediately before departing for the first work site of the day or arriving home from the last work site of the day.

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[69] *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).

[70] *Sampson*, 2012 U.S. Dist. LEXIS 103012, at **23-25.

[71] *Id.* at **50-54.

[72] *See, e.g.,* California Dept. of Indus. Relations, IWC Order 4-2001 11(D); Washington Dept. of Labor & Indus., Admin Policy ES.C.6.

[73] 29 U.S.C. § 254.

[74] *IBP Inc. v. Alvarez*, 546 U.S. 21, 37 (2005).

[75] 29 C.F.R. § 785.33.

[76] *Thomas v. Total Health Home Care Corp.*, Case No. 002493 (Philadelphia County, Pennsylvania Court 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).

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