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ADMINISTRATOR'S SUMMIT
MAY 8–10, 2023

Legal Q&A: Avoid Employee Compensation Red Flags

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1

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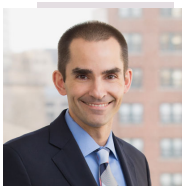
Presented By



Robert W. Markette, Jr., JD, CHC, HCS-C, is an attorney with Hall, Render, Killian, Heath & Lyman PC. For 20 years, Markette has focused his practice on representing home health, hospice and private duty providers in all aspects of their operations, and he has developed a reputation for understanding the operational, compliance and legal/regulatory issues facing home care providers. Markette is a frequent speaker on home health, hospice, and private duty matters across the country. He has presented to the American Health Lawyers Association and the National Association for Home Health and Hospice Care, other national speaking events, and numerous state trade association conferences and continuing education sessions. He serves on the Board of the Association for Home Care Compliance and is the technical reviewer/author of the Homecare Administrator's Field Guide (currently in its 6th edition) and the Home Health Patient Rights Policy and Procedure Manual. Markette is certified in health care compliance by the Health Care Compliance Board and is on the Board for the Association for Homecare Coding and Compliance.

2

2

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Agenda

- Current Enforcement Environment
- Questions
- Common Areas of Non-Compliance
  - Travel Time
  - Aggregating Hours
  - Worker misclassification
  - Bonuses

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The Current Enforcement Environment

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FLSA, DOL and the Current Enforcement Environment

- DOL considers health care to be a “Low Wage, High Violation” industry.
- In FY2022, DOL recovered $32.5 M in back wages for health care workers.
- On November 16, 2022, DOL announced that it had recovered $1.2 M in back wages for 599 home care workers from 4 different HHAs in TX.
- “The majority of the home healthcare industry’s workers are women of color and despite the critical work they do – and the tremendous compassion and commitment they show – their hourly wage rates remain among the lowest in the nation,” explained Southwest Regional Wage and Hour Administrator Betty Campbell.
- Of course, this fails to take into account stagnant reimbursement rates.

5

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FLSA, DOL and the Current Enforcement Environment

- February 15, 2023, DOL recovers $380,000 in back wages for 126 employees of 2 home health companies.
  - Issue: one company failed to aggregate hours for employees; other company just didn’t pay OT premium
- February 7, 2023, Federal Court in Illinois ordered Midwest Home Care to pay $1.1 Million in back wages and damages.
  - Issue: Agency paid a “daily rate” regardless of hours worked.
  - Workers were in the home for more than 24 hours at a time.
  - Failed to comply with Sleep Shift rule as well.
- January 24, 2023, Federal Court in Pennsylvania ordered Affectionate Home Health Care Services, LLC and *its owners* to pay $1,176,883 in back wages and an equal amount in liquidated damages.
  - Failed to pay overtime premium for hours worked over 40 in a workweek.

6

6

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FLSA, DOL and the Current Enforcement Environment

- January 19, 2023, DOL obtained a consent judgment against Baywood Homecare for $1,600,000.
  - Failed to pay in home workers overtime premium.
- January 9, 2023, Federal Court in Pennsylvania ordered Lucky's Home Care and its owner Cheryl McMiller, to pay $142,634 in back wages and an equal amount in liquidated damages.
  - Issue: capped overtime. Once employees exceeded the cap, went back to straight time for hours worked.
  - Agency was also assessed a $21,528.00 civil penalty.
- Many more like these
- Examples of other DOL Areas of Focus with Homecare

7

7

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FLSA, DOL and the Current Enforcement Environment

- During FY 2021, a home health agency ordered to pay $432,000 in back wages and damages. EEOC sued company.
  - 171 employees impacted.
  - $215,859 in unpaid wages.
  - $216,938 in liquidated damages.
- Issue in case: **related companies failed to properly aggregate hours for jointly employed individuals**.
- Employees who worked for both agencies were entitled to overtime when they went over 40 hours combined for both companies.
- **WHEN EMPLOYEES WORK FOR RELATED COMPANIES, YOU NEED TO CONSIDER JOINT EMPLOYMENT.**

8

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FLSA, DOL and the Current Enforcement Environment

- DOL sued a home health agency for **misclassifying** employees as independent contractors.
  - Successful Aging Care Net, Inc. (PA): Ordered to paying $4.4 M in back wages and liquidated damages for failing to pay overtime. DOL alleged employer had misclassified home health aides and other employees as independent contractors.
- DOL has a website dedicated to misclassification. https://www.dol.gov/agencies/whd/flsa/misclassification
- This is a significant area of DOL focus.
- Need to understand the how to classify workers.

9

9

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FLSA, DOL and the Current Enforcement Environment

- On November 16, 2022, as part of recognizing “National Home Care and Hospice Month,” DOL announced an initiative that has been ongoing for at least a year.
- This initiative is focused on CNAs, home health aides and personal care workers.
- At the time of the announcement, this initiative had completed more than 1600 investigations.
- **THE DOL FOUND VIOLATIONS IN 80% OF ITS REVIEWS**.
- Most common violations: failure to pay overtime and employee misclassification.

10

10

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FLSA, DOL and the Current Enforcement Environment

- Need to be sure you are complying with the FLSA.
- Enforcement has increased significantly.
  - DOL continues to focus on homecare providers.
- Non-compliance will be very expensive.
  - Back wages to employees
  - Liquidated damages (DOL may seek these in an investigation)
  - Attorney fees and costs (DOL may seek these as well)

11

11

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Questions?

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12

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Common Areas of Non-Compliance

Additional information regarding common mistakes/misconceptions

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13

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Common Ares of Noncompliance

- Travel time
- Aggregating hours
- Misclassification
- Bonuses

14

14

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Travel Time

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Travel Time

Travel from home to work

Normal travel between home and first patient or from last patient to home is not "work time," and is not compensable. This is considered the employee's commute.

Time spent commuting is NOT part of an employee's hours worked.

16

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Travel Time

Travel Between Clients' Homes

Employee time spent traveling that is considered to be "part of [the employee's] principal activity" is considered part of the employee's hours worked.

But…

Any period "during which an employee is *completely relieved from duty* and which [is] long enough to enable him to *use the time effectively for his own purposes* are **not** hours worked." 29 C.F.R. § 785.16(a).

17

17

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Travel Time

Travel Between Clients' Homes

- Homecare employee's principal activity – providing care in clients' homes.
  - Traveling from one home to get to the next client necessary to perform principal activity. Employee must be at the client's home to provide care in the home.
- How much time between visits constitutes being relieved of duty sufficiently to allow the employee to use time effectively for the employee's own purposes?
  - 1 hour? 2 Hours? 3 hours? No bright line guidance.
  - Would need to consciously schedule gap.
- Need to have mechanism to capture driving time.

18

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Travel Time

Impact of uncompensated Travel Time:

- Straight Time – failing to capture travel time means employee worked hours for which the employee was not compensated.
- Overtime – failing to capture travel time may also mean that the employee worked overtime and was not compensated.

19

19

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Travel Time

Example:

Holly Homecareaide is paid $15.00/hour. During the workweek, she recorded 40 hours in patients' homes. During the week she had 5 hours of travel time which was not compensated. Employer paid her $600.00.

Problem: Employer did not pay her for the 5 hours of travel time. As result she was underpaid by $112.50.

45 hours * $15 per hour =	$675.00
5 hours (OT) * $7.50 (OT premium) =	$37.50
Total Compensation =	$712.50

20

20

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Mileage

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21

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Mileage

- FLSA requires employee's compensation to be "paid finally and unconditionally" or "free and clear."
- An employee's wages are not considered "free and clear" if "the employee [pays] directly or indirectly to the employer… the whole or part of the wage delivered to the employee." 29 C.F.R. § 531.35
- Paying expenses incurred related to work, like mileage, means the employee is paying some of their wages indirectly to the employer.

22

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Mileage

- This means that their compensation is actually less than what they were paid.
- In some cases, this can mean the employee's regular rate is actually less than minimum wage.
- Examples: rural employees who drive significant miles each week; times when gas prices are high.

23

23

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Mileage

- During a DOL investigation, investigators may inquire about mileage/expense reimbursement.
- Amounts paid indirectly to employer through unreimbursed expenses are deducted from employees' wages. Can lead to minimum wage violations.
- No specific requirement regarding reimbursement. For example, DOL does not expressly require paying the IRS mileage rate.

24

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Aggregating Hours

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Aggregating Hours

- Joint employment and aggregating hours
  - Biden DOL rescinded Trump Administration Joint Employment Rule.
  - Rule was intended to provide clarity on joint employment.
  - Court challenge led to rule being struck down. Biden Administration rescinded it in full.
  - NOTE: DOL rescinded entirety of 29 CFR 791. **None** of the old joint employment guidance remains.
  - Question: How to assess joint employment now?
- DOL stated that despite rescission, DOL "did not reconsider the substance of its longstanding horizontal joint employment analysis."

26

26

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Aggregating Hours

- How do we address aggregating hour now?
- "Although the Department is rescinding the Joint Employer Rule in its entirety, **it did not reconsider the substance of its longstanding horizontal joint employment analysis.**"
- "The focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers, as it was in the Joint Employer Rule and the prior version of part 791." Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 FR 40939-01

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Aggregating Hours

- The association between two employers will be "sufficient to demonstrate joint employment in the following situations, among others:
  - (1) There is an arrangement between the employers to share the employee's services;
  - (2) one employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
  - (3) *the employers share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer*."
    Rescission of Joint Employer Status Under the Fair Labor Standards Act Rule, 86 FR 40939-01

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Aggregating Hours

The last factor is often the most important in-home care

- Agencies may not have contracts or formal relationships, but they often have related entities.
- Home care employers often overlook this issue.
- When two or more agencies are under common control, need to consider hours employees work for both agencies in the aggregate.

29

29

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Aggregating Hours

- Example: Agency A and Agency B are both owned and controlled by X. If an employee works 25 hours for Agency A in a workweek and 25 hours for Agency B in the same workweek, the DOL would expect to see:
  - Employee receives one paycheck for 50 hours. This is the required aggregation of hours. This would include 10 hours of overtime.
  - Employee should not receive one paycheck for 25 hours from Agency A and one paycheck for 25 hours from Agency B.
  - Failing to capture hours related to joint horizontal employment by agencies that are under common ownership and control can be a significant source of liability.
- This is an area of significant concern for DOL.

30

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Worker Classification

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31

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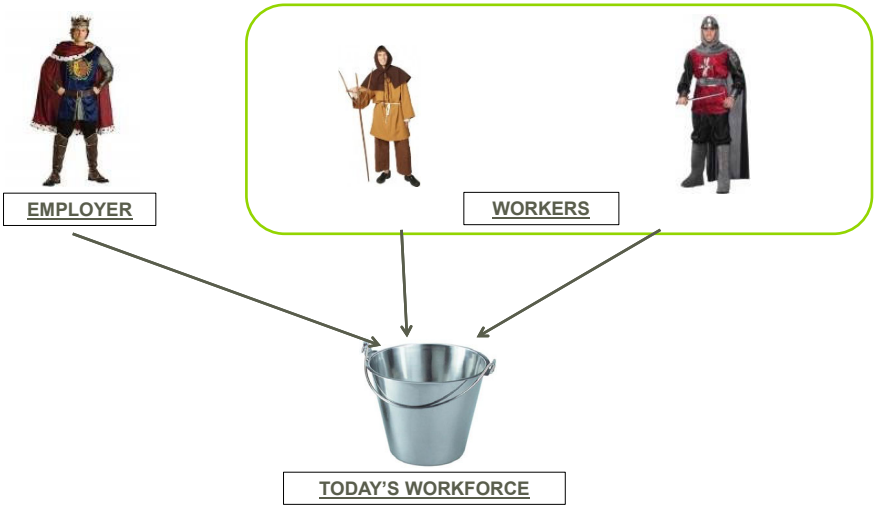
Worker Classification



32

32

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Worker Classification

- Workers can be placed into two categories:

EMPLOYEES

and

INDEPENDENT CONTRACTORS

- Misclassifying workers can lead to a number of compliance issues.

33

33

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Worker Classification – Economic Realities

Worker classification test. 29 C.F.R. Part 795. (current regulation)

- Evaluate the "economic reality" of the relationship using these factors:
  - Nature and degree of control over the work (core factor).
  - Worker's opportunity for profit or loss (core factor).
  - Amount of skill required for work.
  - Degree of permanence of the working relationship.
  - Whether work is part of an integrated unit of production.
  - Additional factors may be relevant.
- All factors evaluated; Core Factors most important.
- Very similar to test developed by federal courts

34

34

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Worker Classification – Economic Realities

Worker classification test. Federal Courts.

- Evaluate the “economic reality” of the relationship using these factors:
  - the nature and degree of the alleged employer's control;
  - the worker’s opportunity for profit or loss;
  - the worker’s investment in equipment or materials;
  - whether the service rendered requires a special skill;
  - the degree of permanency and duration of the relationship;
  - the extent to which the service is an integral part of the alleged employer's business.

35

35

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Worker Classification – Economic Realities

Worker classification test. DOL New Proposed Rule

- On October 13, 2022, DOL published new proposed.
- Under proposed rule, whether a worker is an employee or an independent depends upon 6 factors:
  - Opportunity for profit or loss
  - Investments by the worker and the employer
  - Degree of permanence of the working relationship
  - Nature and Degree of Control
  - Extent to which work is an integral part of the employer’s business
  - Skill and Initiative
- The regulation specifically allows the consideration of additional factors.

36

36

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Worker Classification – Economic Realities

- The current test, the test utilized by the federal courts and the new test the DOL is proposing are all very similar.
- Need to evaluate the factors under the tests.
- You will need to defend your classification of workers as independent contractors.
- REMEMBER: DOL takes a very broad view of who is an employee.

37

37

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Worker Classification – Economic Realities

- **Facts** of the relationship between the worker and the company control.
- Calling an  EMPLOYEE an  INDEPENDENT CONTRACTOR
- Does not make the  EMPLOYEE an  INDEPENDENT CONTRACTOR

38

38

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Bonuses

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Bonuses

- Over the last several years, homecare staffing, like all healthcare staffing, has become very challenging.
- Homecare providers exploring several strategies.
- One that has become very common is the use of bonuses:
  - Sign-on Bonuses
  - Retention Bonuses
  - Commissions/Performance Bonuses

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Bonuses

- **Sign-on bonus**. Generally refers to a bonus paid to an individual as a reward for accepting employment with the company. Usually mentioned in the job opening listing.
- **Retention Bonus**. Refers to a bonus paid to an employee for remaining with the company for a set period of time.
- **Performance Bonus**. Refers to a bonus paid to an employee for achieving certain defined performance metrics – sales, visits, etc.

41

41

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Bonuses

- Bonuses are an issue when awarded to non-exempt employees, because they can impact overtime.
- Non-exempt employees are entitled to be paid 1.5 times the employees' regular rate for any hours worked in excess of forty (40) hours in a workweek.
- Regular rate includes "all remuneration for employment paid to, or on behalf of, the employee" during the workweek. (29 U.S.C. § 207(e))
- Are bonuses remuneration?

42

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Bonuses

- The FLSA excludes certain amounts from the employee's Regular Rate.
- One such exclusion applies to "sums paid as gifts; payments in the nature of gifts made at Christmas time *or on other special occasions*, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." 29 U.S.C. § 207(e)(1)
- If the bonus is a gift, then it is not included in the regular rate and does not impact overtime.

43

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Bonuses

- How do you determine if a bonus is a gift? Key factors:
  - A gift is not earned.
  - If the employee is entitled to receive an amount, it is not a gift.

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Bonuses

- A bonus that is earned is not a gift.
  - This means a bonus that is tied to “hours worked, production, or efficiency … is geared to wages and hours during the bonus period” 29 C.F.R. 778.212(b).
  - Examples: Nursing productivity bonus (visits), marketer bonuses.
  - If the employee earned the bonus by achieving defined goals, it is not a gift and must be included in the Regular Rate.

45

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Bonuses

- In addition, an employee is entitled to a bonus if:
  - They have a contractual right to bonus that is enforceable in court.
  - The bonus is required by
    - A Statute;
    - An ordinance; or,
    - A collective bargaining agreement.
- In each of these cases, the bonus cannot be a gift, because the employee is entitled to receive it.

46

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Bonuses

- Related issue: clawback provisions.
- Clawback provisions come up frequently with sign-on bonuses. Allows employer to a bonus from an employee. This may be for a number of reasons:
  - Employee misconduct
  - Employee performance
  - Employee quits prematurely
- This raises two issues:
  - If employer claws back a bonus, is it still a gift?
  - How can you legally claw back?

47

47

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Bonuses

- DOL Guidance on when an amount that is clawed back is still a gift.
- **A sign-on bonus with no clawback provisions is excluded from the employee's regular rate.** This type of bonus cannot be linked to the employee's hours worked or productivity, because they have not worked yet.
- A sign-on bonus that has a clawback provision due to an ordinance, collective bargaining agreement or policy must be included in the employee's regular rate.
- A sign-on bonus that has a clawback provision that is not due to an ordinance, collective bargaining agreement or policy and that complies with 29 C.F.R. 778.212 can be excluded from the regular rate.
  84 Fed. Reg. 68751.

48

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Bonuses

- A sign-on bonus that has no clawback provision is not included in the employee's regular rate.
- **NO CLAWBACK IS THE SAFEST APPROACH**.
- Two considerations for utilizing clawbacks:
  - Cannot be due to statute, ordinance or CBA.
  - Must comply with DOL Guidance – not linked to hours worked or productivity.

49

49

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Bonuses

- Why is this important?
- For non-exempt personnel, bonuses, that are not gifts, impact overtime.
- Need to apportion the bonus back over the entire period for which it was earned.
- If a bonus that must be included in remuneration is earned over multiple pay periods, it will impact overtime over multiple pay periods.

50

50

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Bonuses

EXAMPLE: A sign on bonus requires a non-exempt employee to stay with the company for four weeks. This would need to be apportioned back across the four weeks. Overtime would then need to be recalculated for any of the four weeks in which the employee worked more than 40 hours. (This is the DOL Case.)

Apportioning the bonus back over the four-week period shows the impact on overtime.
Week 2-$250.00/46 hours = $5.43 Additional overtime = ($5.43* 6)/2 = $16.29.

Week 4 $250/50 hours = $5.00. Additional Overtime = ($5.00 * 10)/2 = $25.00. $16.29 + $25.00 = $41.29.

The employee should have been paid $1,041.29 to allow for the impact of the bonus on his regular rate ($1,000.00 bonus + $41.29 overtime).

51

51

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Thank you. Questions?

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52