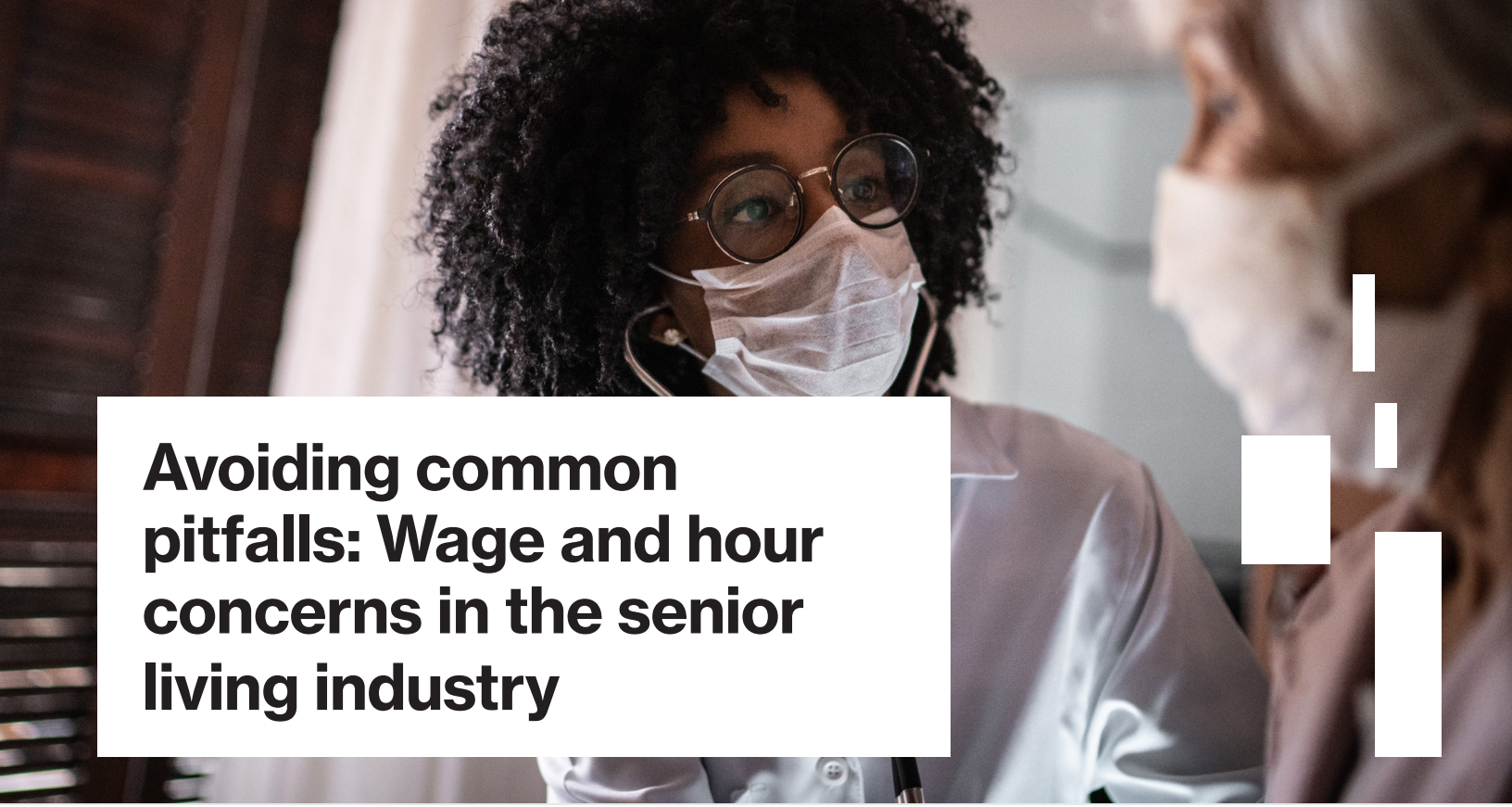

Avoiding common pitfalls: Wage and hour concerns in the senior living industry

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Introduction[1]

The senior living industry, due to the 24/7 nature of its operations, staffing requirements and business model, is prone to wage and hour lawsuits. Coupled with the fact that an employer's legal obligations have become more onerous throughout the years, even the most well-intentioned senior living providers can run afoul of confusing and conflicting wage and hour laws. We have consistently seen an uptick in single and collective wage and hour disputes across the country, as well as increased state and federal wage and hour enforcement efforts. To the extent facilities have not been faced with such a lawsuit or agency investigation, it is likely only a matter of time, particularly in hot bed states like California, New York, New Jersey and Florida, before they are.

This White Paper explores trends we are seeing in wage and hour litigation specific to the senior living industry, how COVID-19 has amplified some of these concerns and the limited availability of insurance coverage for wage and hour claims, which necessitates providers being proactive in becoming and remaining compliant with evolving wage and hour laws.

Background

Wage and hour liability arises from a federal law known as the Fair Labor Standards Act (FLSA). The FLSA was passed by Congress to protect certain rights of workers and to ensure fair compensation. The FLSA sets our nation's minimum wage and overtime requirements, mandates that employees are paid for all time worked, and further sets forth factors necessary to determine classification.

Most states and localities have parallel wage and hour regulations that offer extra protection to the employee, such as daily overtime, meal and rest break requirements, and timing for wage payments. Workers are entitled to the most favorable treatment under the law, whether it be from federal, state or local regulations.

The law further provides for a collective action mechanism (similar to a class action claim, although plaintiffs in a collective action need to affirmatively opt in to the collective action) against employers for wage and hour violations. This procedure allows the aggregation of employees' claims – which can grow quite rapidly. To proceed as a collective action under the FLSA, employees, must be "similarly situated," meaning the employees are subject to a common policy, plan or design that fails to compensate employees as required under the law.

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Most states provide for a collective action procedure for state wage claims similar to federal law. In addition, California employees have the protection of a very a powerful law — the Private Attorneys General Act (PAGA) — which essentially authorizes employees who are subject to alleged labor code violations to act as private attorneys general, i.e., they can pursue civil penalties as if they were a state agency. Typically, a California employee will file a PAGA lawsuit on behalf of themselves and other aggrieved employees of that company. PAGA generates millions of dollars in revenue for the state of California annually. Quite notably, an employer generally will be unsuccessful in compelling arbitration of PAGA claims seeking civil penalties under PAGA, even when an employee has signed a contract agreeing to arbitrate employment-related disputes.[2]

Recent litigation

The senior living industry is particularly vulnerable to FLSA and state wage and hour claims given the natural conflict between meeting resident needs, maintaining required staffing levels and complex federal, state and local employment laws. This area of law has become very popular with the plaintiffs' bar because, if there is any indication that the wage and hour laws were not complied with, employees are entitled to back pay, liquidated damages and attorneys' fees. Federal law, as well as some state laws, even provide for individual liability of individuals who exercise sufficient control over the employer's operations, as well as punitive damages. In short, the possible recovery for employees and their counsel is substantial. Furthermore, the legal costs associated with defending against such claims can easily run into six figures or higher. **Here are some recent examples illustrating the high stakes and costs of this litigation:**

- A New York City in-home health provider agreed to a $12.5 million settlement after facing claims of alleged FLSA and state labor law wage violations. Specifically, plaintiffs had alleged that the health provider employer failed to pay overtime to compensate employees for all time worked (including traveling between clients).[3]
- The United States Department of Labor (DOL) obtained a nearly $130,000 judgment against a Virginia home health care company for misclassification of its workers as independent contractors and failure to pay overtime.[4]
- The DOL further won a $1.2 million judgment for back pay and liquidated damages against a Virginia-based home health care provider for miscalculating overtime.[5]
- Three nursing homes in Rhode Island paid more than $261,000 in back wages, damages and civil penalties for overtime and minimum wage violations after the DOL determined that they had failed to pay their care workers for all hours worked.[6]
- An assisted living provider in Washington State was fined $213,461 resulting from the DOL's investigation of overtime pay.[7]
- In California, there were two separate court rulings in the Northern District of California for over $1 million in back wages and damages to staff in several residential care facilities.[8]

Frequent wage and hour issues encountered by senior living providers; mitigating the risk[9]

Below we discuss common problems that plague the senior living industry in terms of wage and hour compliance and best practices to mitigate risk.

Meal breaks and an auto deduction policy

Senior living employers face difficult practical challenges with meal breaks. Differing from other industries, many senior living providers cannot ensure that staff are actually afforded their breaks given patient demands and the transient nature of the job. For this same reason, it is a widespread issue that staff simply cannot go on their scheduled breaks due to a resident issue or emergency. An all-too-common issue that results in liability here is the innocent use of automatic meal break deductions programmed in a facility's payroll system to ease the administrative burden on the care staff and their supervisors.

Imagine this scenario: An aide is scheduled for a lunch break at 1 p.m., but she has a resident alarm sound just before her break. The aide tends to the resident who has fallen and before she knows it, she worked through her lunch. The employer has a payroll system that automatically deducts that lunch period time from her worked hours. Due to the automatic deduction feature for meal breaks, the employer has now failed to pay the aide for all hours worked (which could, of course, result in overtime violations as well) and has failed to maintain accurate time records. The automatic deduction is problematic for this reason. Some employers do not auto deduct meal periods, but instead have a "prompt" within the time system which requires that the caregiver check off whether he or she has had an uninterrupted meal period. While employers may believe this is an easy fix, employers can still get dinged using the process if employees report feeling coerced to check off "yes" when they have worked through their meal break. Moreover, this process is not accurate from a timekeeping perspective.

The simple rule is that all time worked is compensable under the law. So, whether it is an improper auto-deduction scenario, like the one above, or a scenario in which an employee on an unpaid "lunch break" is checking their work emails and completing resident charts, the company faces liability. All it takes is one employee (or perhaps a disgruntled former employee) to realize that they were not paid for time that they worked to trigger a collective action against the employer or an investigation by the DOL or state wage and hour agency.

Furthermore, and of great importance, many states have additional laws requiring that uninterrupted meal periods be taken within a certain period during the employee's shift. This can be difficult to manage depending on the number of employees working on a particular shift, staffing requirements, and the operational needs of the senior living employer. Regardless of difficulty, failure to comply absent an exemption can result in significant liability. For example, in California, employers are responsible for one entire hour of pay for each opportunity missed to take a break (as required by applicable wage orders) throughout the workday per employee.[10]

Off-the-clock work and rounding practices

We all know that many senior living employees — nurses, aides, housekeepers — have demanding jobs that are often transient. As such, it is especially difficult for their employers to monitor work time. Moreover, it has been custom and/or an accepted practice in the industry to require employees to perform certain "simple" job-related tasks before or after they clock out. These facts make this industry vulnerable to claims of off-the-clock work.

This all goes back to the simple rule stated above: all time worked is compensable.

This includes, for example, time attending training programs, meetings and lectures; completing resident charts; travel time between home visits or company facilities; maintaining work-required attire or uniforms.[11] We often find that off-the-clock work not only results in failure to pay for all hours worked, but also gives rise to unpaid overtime claims because not all of the employee's hours had been recorded. Since senior living providers operate 24 hours a day every day, failure to record all hours worked can result in greater liability than for the average employer.

Quite notably, off-the-clock work is so commonplace in the broader health care industry, that the DOL has published a fact sheet specifically for health care employees, including assisted living and residential care facility employees, in connection with compensable time.[12] in this fact sheet, the DOL states that improperly rounding hours worked is a common FLSA violation in this industry. The FLSA mandates that employers accurately record and pay hourly workers for all time worked.[13] This appears to be simple, but as many of us know, it can be an administrative challenge to capture all time actually worked. The DOL (and many state counterparts) explicitly permit certain rounding practices to ease the burden of timekeeping practices.[14] While rounding is practical and can be permissible, employers must ensure that such practices are within the confines of the law. The courts generally rule in favor of employees where a company's rounding policy works to the employer's advantage or failed to average out over time. **Here are some examples as provided by the DOL:**

- An employee's schedule is 7 a.m. to 3:30 p.m. with a thirty-minute unpaid lunch break. The employee receives overtime compensation after 40 hours in a workweek. The employee clocks in 10 minutes early every day and clocks out 7 minutes late each day. The employer follows the standard rounding rules. Is the employee entitled to overtime compensation? Yes. If the employer rounds back a quarter hour each morning to 6:45 a.m. and rounds back each evening to 3:30 p.m., the employee will show a total of 41.25 hours worked during that workweek. The employee will be entitled to additional overtime compensation for the 1.25 hours over 40.
- An employer only records and pays for time if employees work in full 15-minute increments. An employee paid $10 per hour is scheduled to work eight hours a day, Monday through Friday, for a total of 40 hours a week. The employee always clocks out 12 minutes after the end of her shift. The employee is paid $400 per week. Does this comply with the FLSA? No, the employer has violated the overtime requirements. The employee worked an hour each week (12 minutes times five) that was not compensated. The employer has not violated the minimum wage requirement, because the employee was paid $9.75 per hour ($400 divided by 41 hours). However, the employer owes the employee for one hour of overtime each week.[15]

Impermissible deductions

Many senior living employers require their staff to wear uniforms. The practice of automatically deducting the cost of the uniforms has become commonplace in the industry. While federal law generally permits an employer to deduct certain expenses from an employee's paycheck,[16] so long as the employee is still making minimum wage, such a practice could violate state and local law.

In this regard, many states have implemented much more stringent and employee-protective regulations in connection with wage deductions that senior living employers must consider. For example, New Jersey prohibits any wage deduction for uniforms.[17] In addition, an employer may not require an employee to purchase a uniform that contains a company logo or cannot be worn as street wear. California explicitly provides that an employer must – at their own cost – provide all tools and equipment necessary to perform the job.[18] Whether or not a deduction is permissible, as well as the rules governing how a permissible deduction may be implemented (for example, the deduction must be authorized by the employee in a signed writing) vary from state to state. As such, before an employer deducts the cost of scrubs, uniforms, equipment or meals, it must ensure compliance with state and local law.

Exempt versus non-exempt

Under the federal law, an employer is permitted to identify certain employees as "exempt," meaning these employees are exempt from overtime requirements.[19] In order to meet such an exemption, the employee must be compensated at a certain threshold, on a salaried basis, and meet specific job requirements.[20] Improperly identifying an employee as exempt can come with grave consequences, i.e., claims of failure to pay for all hours worked, failure to pay overtime, and in some jurisdictions such as California, can result in significant liability with regard to failure to provide meal and rest breaks.

Many senior living providers find themselves in hot water when it comes to improper classification. In this regard, appropriate classification of health care workers can be difficult and confusing. For example, an all-too-common scenario is the innocent, but incorrect, belief that all nurses are exempt from overtime requirements. Indeed, under the current DOL regulations, registered nurses may meet the learned professional exemption to the FLSA, but that exemption is not automatic. Rather, an employer must carefully examine the duties actually performed by the nurse and whether the nurse is paid on a salary basis. Also, the federal regulations specifically exclude licensed practical nurses from the exemption.[21]

Another prevalent pitfall we see across the senior living industry is the over usage of the managerial exemption. Again, whether a manager is exempt is determined by a fact-specific analysis based on their actual job duties. For example, a nurse's aide "manager" who spends most of their time filling in for missing staff and/or providing coverage due to resident and facility needs would most likely not be exempt. Given the evolution and complexity of the FLSA, coupled with burdensome state laws, ensuring proper classification is not only a difficult analysis, but if done improperly, a potentially costly mistake.

Independent contractors

It is commonplace for senior living providers to use staffing agencies and independent contractors to keep up with the fluctuating needs of residents and facility census. This is especially true for providers in such states as California, which employs a prohibition of the corporate practice of medicine that generally prohibits certain entities from hiring physicians directly, even when their services might be necessary or even required by law or government contract.

Independent contractor tests vary by state, but many jurisdictions are making it increasingly difficult to properly classify an individual as a "contractor" as opposed to an employee. Improper classification can result in significant liability, including claims for unpaid wages, overtime compensation, meal and rest break violations, unemployment claims, workers compensation violations, and possible employment tax withholding requirements as well as possibly subjecting the entity to additional scrutiny by the IRS and state workers compensation and unemployment agencies.

Inclement weather and other emergencies

Inclement weather and natural disasters pose an important concern for senior living employers who need to ensure continuity of resident care and staffing ratios in the wake of perilous traveling conditions. Whether it be a snowstorm, hurricane or wildfire, senior living communities have no choice but to ask (or even require) employees on staff during the time of the disruption to remain on shift through the night. Of course, any hours that the employees truly spend working must be compensated...but what about time spent sleeping at the community?

The FLSA provides that if an employee works for more than 24 hours, up to eight hours of sleep time may be deducted pursuant to an agreement between the employer and employee, if and only if, the employee is provided with adequate sleeping facilities and the employee can usually enjoy an uninterrupted night's sleep.[22]

Employers may not take any benefit of a reduction unless at least five hours of sleep is taken. Notably, even if an employee sleeps more than eight hours, the employer cannot deduct more than eight hours.[23] State laws, of course, may afford additional protection to the worker.

Impact of COVID-19 on wage and hour concerns [24]

Senior living providers have been uniquely challenged this year in the face of COVID-19. Whether it be resident care, the health and safety of staff, shortage of staff and protective gear — the industry has been greatly impacted. Unfortunately, a provider's wage and hour risk has also increased along with the pandemic. Specifically, we have seen increased exposure in the following areas: (i) identifying compensable time, (ii) off-the-clock work and (iii) an increase in temporary workers through staffing agencies improperly classified as independent contractors.

As we discussed above, all time worked is compensable. In response to the pandemic, senior living providers have implemented certain safety measures, as required by law and/or best practices. These practices include, for example, temperature checks prior to beginning a shift, donning and doffing PPE, as well as required COVID-19 testing. These are also all examples of compensable time. Accordingly, it is critical that providers update any current policies and practices to ensure that it is made clear that employees must be clocked in for these periods. Again, off-the-clock claims are expensive and popular, so it is prudent to quickly correct any non-compliant procedures.

Second, the pandemic has only increased the already high intensity of the job for providers and their staff. With that comes more opportunity to incorrectly log time worked. Indeed, staff are busier than ever. Such an environment lends itself to workers forgetting to clock in when they begin a shift, failing to take a break, or conducting work after they clocked out. The environment also breeds a laxer attitude by employers on clocking in and out procedures. Unfortunately, these factors do not obviate an employer's responsibility (or their exposure) to adhere to the wage and hour requirements.

Lastly, providers have naturally increased usage of staffing agencies in response to the high demand of services. As discussed above, simply using temporary workers through staffing agencies does not negate the employer-employee relationship. Because the classification of an employee brought in via a staffing agency as an independent contractor is a common problem, it is without question that such increased use of staffing agencies has increased potential misclassification lawsuits for senior living employers.

Systems and processes needed to support compliance

Given complex regulations and significant liability, what can a senior living employer do? Along with discussions with your employment counsel in the jurisdictions in which you operate, **the following are certain recommended practices to have in place to mitigate risk and ensure compliance:**

- Ensuring up-to-date and compliant employee handbooks and wage and hour policies and procedures.
- Accurate job descriptions that reflect what the employee truly does and are not aspirational.
- All staff training in connection with the company's wage and hour policies (including accurately logging work, meal and rest breaks, and the importance of not conducting work off-the-clock) should make clear that failure to comply with company policy will result in discipline.
- Management training to ensure that your leaders are educated on wage and hour laws and compliance obligations (a company's supervisors must act as gatekeepers and be held accountable by the company for FLSA and state wage and hour law compliance).
- Eradicating any automatic meal deduction policy or program: instead, employees should manually clock out when they leave for meals and clock in upon their return.
- Prohibiting or discouraging administrative staff from eating at their desks: often, employees who eat at their desk will check emails and answer the phone — that is all compensable time.
- Creating an attestation to be signed every time an employee approves their time sheet wherein the employee is clearly certifying that all the work time they entered is accurate, including meal breaks.
- Creating and publishing an error reporting system in which employees can easily submit an error, in writing, on their time sheet.
- Conducting annual audits of payroll practices, including classification, overtime, the calculation of the regular rate and timekeeping practices: this is the perfect time to catch mistakes quickly and correct them, if needed.

Wage and hour and insurance

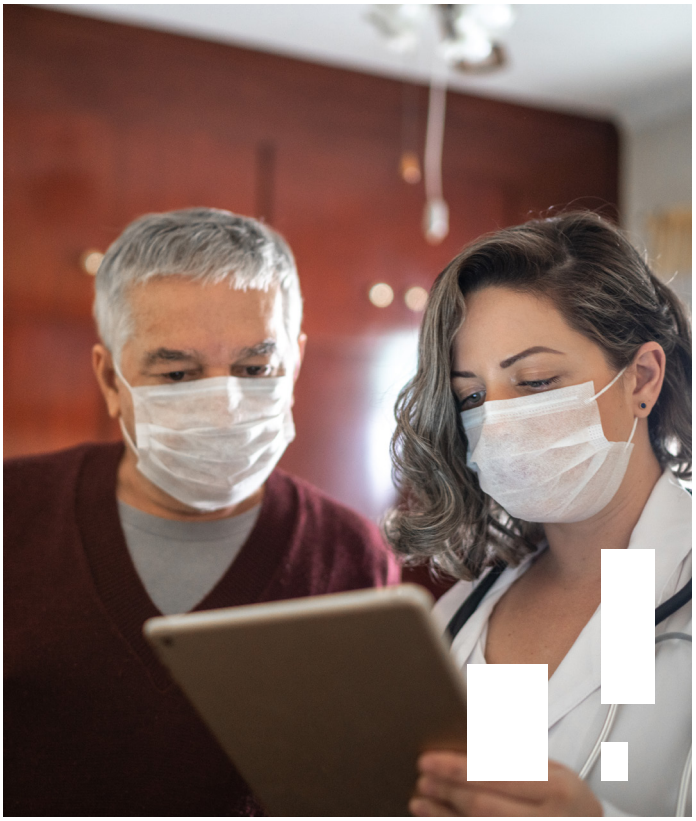
Mitigation practices for wage and hour claims is important for several reasons, including that there is limited insurance coverage available for wage and hour claims. Traditional employment practices liability (EPL) policies specifically exclude coverage for these claims. The primary reason being that such claims typically do not allege an employment practices violation, such as discrimination, wrongful termination, harassment, etc. That being said, some domestic markets will provide a defense cost only sublimit on the EPL policy.

This coverage is typically limited to organizations with fewer than 1,000 employees. The sublimits vary in amount but typically fall in the $150,000 – $250,000 range.

After significant push from the insurance broker and legal communities for a product that provided full wage and hour coverage (defense and indemnity), in 2013 the first policy was written out of Bermuda. The full wage and hour product provides coverage for standard wage and hour claims, such as failure to pay overtime, misclassification, failure to provide meal breaks, donning and doffing claims, etc. This policy's definition of "loss" includes coverage for defense costs, settlements and judgments, civil fines and penalties. And, importantly, this policy provides coverage for California's PAGA claims. When the first policy was written, the retentions and premiums were very high, resulting in the product being geared primarily toward large companies with more than 20,000 employees. Since that time, the capacity has increased, and retentions and premiums have started to decrease. Today, several markets in Bermuda provide this full coverage with retentions typically starting at $1 million.

Conclusion

Wage and hour law is complex and unforgiving. It is critical that senior living providers work with experienced counsel in the applicable jurisdictions to ensure compliance — before being named in a collective action or subject to a time-consuming wage and hour audit by the federal or state department of labor.



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Sources

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[16] See, e.g., 29 CFR Section 3.5.

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