

Charting A New Direction in Wage and Hour Law

Understanding the Ever-Evolving Employee Compensation Rules

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A Time of Significant Challenge

- ❖ Continued Class Action Wage and Hour Litigation
- ❖ Loss of Federal Companionship Exemption
- ❖ Increase in New York Minimum Wage
- ❖ Amendments to the “White Collar Exemptions”
- ❖ Challenges to the NYS DOL 13-Hour Rule for Live-In Aides
- ❖ Joint Employment Guidance
- ❖ Greater Importance on Compliance with Wage and Hour Rules
- ❖ US DOL Memo Regarding Worker Misclassification



Wage & Hour Lawsuits Continue to Skyrocket

Wage and Hour Lawsuits

- ❖ Plaintiffs' attorneys continue to aggressively pursue Class Action wage and hour claims
- ❖ Year over year, federal wage and hour lawsuits filed in federal courts continue to increase. As of September 2014, wage and hour filings increased from 7,500 to 8,160 per year (almost a 9% increase).
- ❖ The 8,160 figure appears to be an all-time high for FLSA filings. It is the highest annual number registered in more than 20 years, according to statistics that go back to 1993, when 1,457 FLSA cases were commenced.

**Wage and Hour Violations
are Costly
and
Potentially Expose Owners
and Officers to
Personal Liability**

Potential Wage and Hour Liabilities

Fair Labor Standards Act (2 or 3 years if "willful")	New York Labor Law (civil complaint) (6 years)	New York Labor Law (DOL complaint) (6 years)
Back pay	Back pay	Back pay
Liquidated damages equal to 100% of back pay	Liquidated damages equal to 100% of back pay	Liquidated damages equal to 100% of back pay
Fines	Pre-judgment interest on the unpaid wages at a 9% annual rate	Interest on the unpaid wages at 16% annual rate
Willful violations of the FLSA may result in criminal prosecution and the violator fined up to \$10,000. A second conviction may result in imprisonment.	Employers who fail to pay wages in accordance with the provisions of the Labor Law, and the officers and agents of any corporation who knowingly permit such failure, are guilty of a misdemeanor for the 1st offense and a felony for the 2nd offense	Employers who fail to pay wages in accordance with the provisions of the Labor Law, and the officers and agents of any corporation who knowingly permit such failure, are guilty of a misdemeanor for the 1st offense and a felony for the 2nd offense
Civil money penalties (CMPs) up to \$1,100 for each violation for repeated or willful violations of the FLSA.	Attorneys' fees, unless the civil action is brought by the NY DOL on behalf of individuals	Civil penalty of up to 200% of the unpaid wages if the employer willfully or egregiously fails to pay wages.
Attorneys' fees or injunctive relief	Litigation costs	An additional 15% in damages if the employer does not comply with a compliance order within 90 days

**Elimination of the
Federal Companionship
and
Live-In Domestic
Service Exemptions**

Final Rule Eliminating the Companionship & Live-In Domestic Service Exemptions

- ❖ On October 1, 2013, the Department of Labor promulgated a Final Rule that made a number of important changes to the companionship and live-in domestic service exemptions under the FLSA. Most notably, the Final Rule eliminated these exemptions for “third-party providers” of home care services.
- ❖ As a result of this change, home care agencies that employ home health aides are required pay overtime at the rate of 1.5 times each aide’s “regular rate of pay,” rather than 1.5 times the minimum wage.
- ❖ The Final Rule does not change the DOL’s regulations regarding “hours worked” by employees during travel time, sleeping, meal periods, and time spent waiting.

Final Rule Litigation

- ❖ In *Home Care Association of America v. Weil*, a number of home care industry groups challenged the Final Rule.
- ❖ On December 22, 2014, the U.S. District Court for the District of Columbia vacated the third-party provider section of the Final Rule, thereby allowing “third party providers” to continue to rely upon the companionship and domestic service exemptions.
- ❖ On August 21, 2015, the U.S. Court of Appeals for the D.C. Circuit reversed the District Court’s ruling, unanimously upholding the validity of the Rule.

Moving Forward

- ❖ On October 6, 2015, U.S. Supreme Court Chief Justice Roberts denied the application for a stay of the D.C. Circuit's ruling.
- ❖ The Supreme Court is considering whether to hear an appeal by the National Association for Home Care & Hospice and other co-plaintiffs.
- ❖ While possible, it is statistically unlikely that the Supreme Court will agree to hear the industry groups' appeal.
- ❖ The rule went into effect on October 13, 2015

**The Minimum Wage Continues
to Increase, and More
Significant Increases May
be on the Horizon**

New York Minimum Wage

- ❖ Currently, State minimum wage is \$8.75 per hour
- ❖ As of December 31, 2015: \$9:00 per hour
- ❖ Higher Rates under Wage Parity for NYC and for Westchester, Suffolk, and Nassau Counties.
- ❖ Governor Cuomo announced that he wants to raise New York's minimum wage for all workers to \$15 per hour.

**United States Department
of Labor Proposes
Significant Changes to
Regulations Governing
“White Collar” Exemptions**

Amendments to the “White Collar” FLSA Exemptions

- ❖ On March 13, 2014, President Obama issued a Presidential Memorandum directing the Secretary of Labor to issue updated regulations regarding the “white collar” overtime exemption regulation and consider how they could be revised to:
 - Update existing protections in keeping with the intention of the Fair Labor Standards Act.
 - Address the changing nature of the American workplace.
 - Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.

Proposed “White Collar” Changes

- ❖ On June 30, 2015, the U.S. Department of Labor released a proposed rule that would amend the “white collar” exemptions.
- ❖ If adopted, the proposed rule would dramatically increase the minimum salary level for the executive, administrative, and professional exemptions from \$455 per week (\$23,660 per year) to a projected \$970 per week (\$50,440 per year).
 - For New York employers, the current minimum salary level for administrative and executive employees is \$656.25 per week (\$34,125 per year).
- ❖ The proposed rule would also increase the minimum salary level for the “highly compensated” employee exemption from \$100,000 per year to \$122,148 per year.

Proposed “White Collar” Changes

- ❖ Additionally, the DOL has proposed indexing these minimum salary levels to either wage growth or inflation, and adjusting them annually.
- ❖ The DOL is considering indexing the minimum salary level for executive, administrative, professional, and computer employees to the 40th percentile of earnings for full-time salaried workers, and to the 90th percentile for highly compensated employees.
- ❖ Alternatively, the DOL is considering indexing these minimum salary levels to the consumer price index for urban consumers (CPI-U).

Proposed “White Collar” Changes

- ❖ Interestingly, the proposed rule does not seek to amend the duties tests applicable to the white collar exemptions.
- ❖ Instead, the DOL is seeking public comment on whether the duties tests are working as intended to screen out employees who it does not believe are bona fide exempt employees.
- ❖ The DOL expressed concern that, in some circumstances, the current duties tests allow employees to be classified as exempt where they are performing “a disproportionate amount” of nonexempt work.

Status of Proposed “White Collar” Changes

- ❖ The DOL stated that it would not extend the time for interested parties and stakeholders to file comments, and true to its word, the 60-Day comment period closed on September 4, 2015.
- ❖ The DOL received 247,064 timely comments (an additional 42,854 have been submitted after the deadline).
- ❖ The DOL is aiming to have these changes become effective in first quarter 2016.
- ❖ The DOL estimates that, as a result of these changes, 4.68 million employees who are currently treated as overtime exempt will, without intervening action by their employers, become eligible for overtime pay in the first year the rule is in effect.



Challenges to 13-Hour Rule for Live-In Aides

Litigation of 13-Hour Rule

- ❖ Under the longstanding NYS DOL rule, live-in home health aides may be compensated for 13 hours per day provided they receive 8 hours of sleep (5 of which must be uninterrupted) and 3 hours for bona fide meal periods per 24-hour shift.
- ❖ Courts considering this issue include:
 - In September 2014, *Andryeyeva v. New York Health Care*, the Supreme Court, Kings County, found that sleep and meal periods must not be excluded from a home attendant's hours of work where the attendant does not "reside" in the home of his or her client. The court therefore certified a class of over 1,000 attendants who worked 24-hour shifts.
 - And in September 2015, in *Lai Chan v. Chinese-American Planning Council Home Attendant Program*, plaintiffs sought compensation for every hour of each 24-hour shift. The defendant home care agency moved to dismiss the class action complaint, in part, on the basis of the Department of Labor's longstanding 13-hour rule. The court rejected the home care agency's motion to dismiss and suggested that live-in aides are "entitled to 24 hours pay."

Litigation of 13-Hour Rule

- ❖ The analysis of both the *Lai Chan* and *Andryeyeva* decisions have centered on the interaction between New York Department of Labor's regulation and its opinion letters interpreting that regulation.
- ❖ The regulation at issue provides that employees must be paid for the time they are permitted to work or are required to be available for work, but that "a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment." The regulations do not contain a similar sleeping time carve-out for non-residential employees.
- ❖ The Department of Labor, however, has issued opinion letters stating that it would apply the 13-hour rule to both residential and non-residential employees. Despite the Department's interpretation of its own regulation, the courts in *Lai Chan* and *Andryeyeva* have permitted these cases to proceed.



Joint Employment in the Home Care Industry

Joint Employment Generally

- ❖ A single individual may be simultaneously considered an employee of more than one employer under the FLSA.
- ❖ In such cases, the employee's work for the joint employers is considered as one employment for purposes of the FLSA, and the joint employers are individually and jointly responsible for FLSA compliance, including paying not less than the minimum wage for all hours worked during the workweek and, if applicable, overtime compensation for all hours worked over 40 in the workweek.
- ❖ Joint employment is determined by applying the "economic realities" test, which examines a number of factors to determine whether a worker is economically dependent on a purported employer, thus creating an employment relationship.

Joint Employment

- ❖ Factors to consider may include:
 - whether a possible employer has the power to direct, control, or supervise the worker(s) or the work performed;
 - whether a possible employer has the power to hire or fire, modify the employment conditions or determine the pay rates or the methods of wage payment for the worker(s);
 - the degree of permanency and duration of the relationship;
 - where the work is performed
 - whether the tasks performed require special skills;
 - whether the work performed is an integral part of the overall business operation;
 - whether a possible employer undertakes responsibilities in relation to the worker(s) which are commonly performed by employers;
 - whose equipment is used; and
 - who performs payroll and similar functions.
- ❖ Other factors also may be considered and no one factor is controlling.
- ❖ The ultimate question is one of economic dependence.

Determining Joint Employment in Home Care

- ❖ The DOL has stated that, in the home care context, there are a variety of employment situations in which joint employment may exist
- ❖ Applicability to Consumer Directed Programs (CDPAP)



Common Wage and Hour Errors

Common Overtime Violations

- ❖ Overtime pay violations often occur when employers:
 - Fail to pay employees for all hours worked
 - Fail to pay overtime after 40 hours worked
 - Fail to count the time spent "on-call"
 - Fail to include shift differential, bonuses, commissions, or on-call fees in calculating an employee's regular rate
 - Fail to pay overtime to non-exempt, salaried employees (e.g., clerical staff, cooks, and activities directors)
 - Improperly classifying employees as exempt
 - Providing compensatory time off instead of paying overtime
 - Fail to pay overtime to employees who perform exempt duties but are not paid on a salary basis (e.g., an RN who is paid hourly)



Hours of Work

Off-the-Clock Work

- ❖ An employer must compensate its employees for work that is not expressly authorized if the employer knew or should have known that it was being performed.
- ❖ In contrast, an employer is generally not required to pay for time worked when the employer did not know, and had no reason to know, that the work was being performed.

Preliminary & Postliminary Time

- ❖ Activities that are preliminary or postliminary to employees' principal activities are compensable if those activities are both "integral and indispensable" to the "principal activity" for which the worker is employed.
- ❖ "Indispensable" has been defined as "necessary," and "integral" activities have been described as those "essential to completeness, organically joined or linked, or composed of constituent parts making a whole."

Sleeping Time

- ❖ General Sleeping Time Rule. An employee must be paid for all hours on duty, even though he or she is permitted to sleep or engage in other personal activities when not busy. However, if an employee is completely relieved from duty (i.e., he or she is able to use the time effectively for his or her own purposes) and is able to take a duty-free, uninterrupted break period of at least 30 minutes in duration (e.g., a relief employee is provided), the time need not be compensated.
- ❖ Sleeping Time Rule for Aides. The general rule is followed, unless the aide is required to be on duty for 24 hours or more, in which case the NY DOL has opined that the employer and the employee may agree to exclude a bona fide regularly-scheduled sleeping period of not more than 8 hours, so long as adequate sleeping facilities are furnished by the employer.
This rule has been called into question by the courts.

Meal Periods

❖ Rules Regarding Meal Periods

- All employees must be provided with an uninterrupted, duty-free meal period of at least 30 minutes in duration when they work more than 6 hours and their shift spans the period from 11 a.m. to 2 p.m.
 - ✓ This meal period must be taken between 11 a.m. and 2 p.m. and employees must be permitted to leave their workstations.
- Employees who work more than 6 hours in a shift that starts between the hours of 1 p.m. and 6 a.m. must receive an uninterrupted, duty-free meal period of at least 30 minutes in duration.
- If an employee is employed for a period starting before 11 a.m. and continuing after 7 p.m., he or she must be provided an additional meal period of at least 20 minutes in duration between the hours of 5 p.m. and 7 p.m.

Meal Periods

- ❖ General Rule. Duty-free, uninterrupted meal periods of at least 30 minutes in duration need not be compensated as work time. An employee is not relieved from duty if he or she is required to perform any duties, whether active or inactive, while eating. For example, an employee is "on duty" when they must be in the home and prepared to provide services when required.
- ❖ Aide On Duty for Less than 24 Hours. If an aide is completely relieved from duty (able to use time effectively for his or her own purposes) and able to take an uninterrupted meal period of at least 30 minutes in duration (e.g., a relief employee is provided to cover during meal break), the time need not be compensated.
- ❖ Aide On Duty for 24 Hours or More. The NY DOL has opined that an employer and an aide may agree to exclude bona fide meal periods of no more than 3 hours. If a meal period is interrupted by a call to duty, the meal period will not be considered bona fide. Where there is no express or implied agreement regarding meal periods, the aides' meal periods constitute hours worked. *Again, however, this rule has been called into question by the courts.*

Travel Time

❖ Home-to-Work Travel

- Generally not compensable as hours worked when an employee reports to work in employee's regularly assigned work area.
- If an aide worker travels to the first work site directly from home, and returns directly home from the final work site, this travel time generally does not need to be paid.

Travel Time, Cont.

❖ From Job Site to Job Site

- Compensable.
- An aide going from one patient to another during the workday must be paid for the travel time between the patients.
- If the travel is not direct because the employee is relieved from duty long enough to engage in purely personal pursuits (e.g., eat, shop), only the time necessary to make the trip is generally compensable.
- What if the aide goes home after her first assignment and, after several hours, goes to her second assignment/patient of the day?

Travel Time

❖ Out-of-Town Travel

- Overnight travel away from home community. Time spent traveling, to the extent it cuts across the employee's normal working hours, is compensable. A direct care worker who accompanies a patient on travel away from home must be paid for all time spent traveling during the employee's normal work hours.
- Home-to-Work Travel on special one-day assignment. Travel time is generally compensable.

Time Spent in Training, Lectures, and Meetings

- ❖ Attendance at lectures, meetings, training programs, and similar activities is generally considered compensable time, unless all of the following criteria are met
 - Attendance is outside of the employee's regular working hours;
 - Attendance is in fact voluntary;
 - The course, lecture, or meeting is not directly related to the employee's job; and
 - The employee does not perform any productive work during such attendance.

Pre-Employment Training Programs

- ❖ The New York State Department of Labor examines:
 - Is there a promise of a job with the company at the end of the program?
 - Is the work of the trainee of value or productive for the company?
- ❖ If the answer to both questions is yes, then the trainee will be considered an employee and the time spent in training will be considered work time.

Time Spent on Call

- ❖ Whether time spent on call constitutes hours worked depends upon the employee's ability to use the on-call time for his or her own purposes.
- ❖ An employee who is required to remain on call on the employer's premises or so close thereto that he or she cannot use the time effectively for his or her own purposes is working while "on call."
- ❖ An employee who is not required to remain on the employer's premises but is merely required to leave word at his or her home or with company officials where he may be reached is not working while on call.



Regular Rate Issues

Overtime

- ❖ General Rule. Employers must pay all non-exempt employees time and one-half of their "regular rate of pay" for each hour worked in excess of 40 in a workweek.
- ❖ Regular Rate. An employee's "regular rate" of pay is usually calculated by dividing the total pay for employment (except for those payments expressly excluded) in any workweek (or 14-day period, as applicable) by the total number of hours actually worked.

Determining the “Regular Rate”

- ❖ The regular rate includes all remuneration paid to an employee, unless it falls within one of the statutory exclusions from the regular rate:
 - Gifts made at Christmas time or other special occasions as a reward for service, which are not determined by or dependent on hours worked, production, or efficiency.
 - pay for expenses incurred on the employer’s behalf,
 - true premium pay for work on Saturdays, Sundays, and holidays, or hours worked in excess of eight in a day,
 - discretionary bonuses,
 - payments for occasional periods when no work is available due to vacation, holiday, or illness,
 - pension and welfare contributions to a third party, and profit-sharing plan contributions.

Determining the “Regular Rate”, Cont.

- ❖ Other than the exclusions listed, all other compensation for nonexempt employees becomes part of the regular rate for purposes of calculating overtime. Included in the regular rate are:
 - shift premiums or differentials,
 - nondiscretionary bonuses,
 - commission payments
 - longevity payments, and
 - retroactive pay increases.

Discretionary Bonuses

- ❖ In order for a bonus to qualify as a “discretionary bonus,” the employer must retain discretion as to both (1) the fact of payment and (2) the amount of the bonus, until a time “quite close to the end of the period for which the bonus is paid.” The employer must retain the discretion as to the sum to be paid, if any, without prior promise or agreement. Thus, the employee must not have any contract right, express or implied, to any “bonus” amount. If the employer promises in advance to pay a bonus, then the bonus is not a discretionary bonus.
- ❖ Discretionary bonuses cannot be credited towards overtime due to the employee.

Nondiscretionary Bonuses


- ❖ Any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate.
- ❖ Bonuses which are announced to employees to induce them to work more steadily, rapidly, or efficiently, or to remain with the company, are regarded as part of the regular rate of pay.
- ❖ Attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are also included in the regular rate of pay.

Gifts, Rewards, and Special Occasion Bonuses

- ❖ Gifts, rewards, and special occasion bonuses are also not included in the regular rate calculation.
- ❖ To qualify for this exclusion, the bonus must be a gift or in the nature of a gift. If the amount of the bonus is measured by hours worked, production, or efficiency, the payment is geared to wages and hours during the bonus period and is no longer to be considered as in the nature of a gift.
- ❖ If the payment is so substantial that it can be assumed that employees consider it a part of the wages for which they work, the bonus cannot be considered to be in the nature of a gift.
- ❖ Gifts, rewards, and special occasion bonuses cannot be credited towards overtime compensation due to an employee.

Calculating Overtime When an Employee is Paid Different Hourly Rates for Different Type of Work

- ❖ If an employee receives different rates of pay for work in a single workweek, the employee's "regular rate" for that week is the weighted average of such rates (or "blended rate"). That is, each workweek, the earnings from all hourly rates are added together and the sum is then divided by the total number of hours worked at all jobs for the same employer, and the overtime pay due is one-half of that result, multiplied by the number of hours worked over 40.
- ❖ Alternatively, an employer may calculate the overtime obligation based on the rate for the particular task(s) performed during the hours over 40 in the workweek (i.e., the "rate in effect" or "applicable rate"), but only if there is an agreement or understanding with the employee (made in advance of the performance of work), the hourly rate(s) upon which the overtime is computed are at least the Federal minimum wage, and the hourly rate(s) are actually paid for such work when performed during non-overtime hours.



Unique New York State Compensation Rules

Split-Shift Pay

- ❖ Employees are entitled to an additional hour of pay at the minimum wage rate for any day where the working hours are not consecutive.
- ❖ Working hours are not considered consecutive where there is an intervening period of more than one hour during the workday

Spread-of-Hours Pay

- ❖ Employees are entitled to an additional hour of pay at the minimum wage rate for any day in which the interval between the beginning and end of the employee's workday exceeds 10 hours.
- ❖ The interval between the beginning and end of an employee's workday includes time off for meals and intervals off duty.

Call-In Pay

- ❖ An employee who, by request or permission, reports to work on any day shall be paid at least the lesser of:
 - 4 hours at the basic minimum wage rate; or
 - the number of hours in the employee's "regularly scheduled shift" at the basic minimum hourly rate.
- ❖ Call-in pay is due regardless of whether an employee is "called in" or simply reports for work as scheduled. It may be more useful to think of this requirement as a shift minimum wage which ensures that employees are paid a set minimum amount for each day they report for work.
- ❖ Call-in pay obligation is determined on a workweek basis.

Important Limitation on Splits, Spreads, and Call-In Pay

- ❖ All that is required is that the total weekly wages paid be equal to or greater than the total due for all hours worked at the minimum wage and overtime rate (as applicable), plus one additional hour at the minimum wage for each day in which a “spread” and/or “split” occurs.
- ❖ For “call-in” pay, if the amount actually paid to the employee for the workweek exceeds the total of all hours worked at the minimum wage and overtime rate (as applicable), plus any call-in pay owed, no additional payment for call-in pay is required for that workweek.

US DOL Memo Regarding Worker Misclassification

New US DOL Memo on Worker Misclassification

- ❖ On July 15, 2015, David Weil, the administrator of the U.S. Department of Labor, Wage and Hour Division, issued a highly anticipated Administrator's Interpretation that provides insight into the DOL's current position on the question of whether a worker is an employee or independent contractor under the FLSA.
- ❖ The DOL confirmed that it utilizes a broad "economic realities" test to determine whether workers are employees for wage and hour purposes -- the common law direction and control test is not applied.

New US DOL Memo on Worker Misclassification

- ❖ While the Interpretation does not radically recast worker classification law under the FLSA, it does restate and refocus certain aspects of it in a manner that is more likely to yield a finding of employee status.
- ❖ Businesses should expect that the DOL will utilize the economic realities test, as articulated in the Interpretation, when examining whether workers are properly classified.
- ❖ The Interpretation also confirms that the DOL continues to receive “numerous complaints” from workers alleging misclassification and leaves little doubt as to its view on the merits of such claims by concluding that “**most workers are employees under the FLSA.**”
- ❖ Businesses that classify workers as independent contractors or non-employees should review the Interpretation and carefully examine their non-employee classifications.

Other Worker Classification Developments

- ❖ In its 2015 report, the New York Joint Enforcement Task Force on Employee Misclassification stated that it had identified nearly 26,000 misclassified employees, discovered nearly \$316 million in unreported wages and assessed almost \$8.8 million in additional unemployment insurance contributions.
- ❖ Since its inception, the Task Force has conducted 290 joint enforcement sweeps. These sweeps uncovered about 10,300 misclassified workers and \$52 million in unreported wages. The Task Force is sharing sweep results with the New York Department of Taxation and Finance and the United States Internal Revenue Service.
- ❖ President Obama's proposed 2016 budget reaffirms the Wage and Hour Division's focus on detecting and penalizing worker misclassification. One of its "Key Enforcement Initiatives" for 2015 is addressing the "fissured workplace," which is another term for independent contractor relationships and other business models that treat workers as non-employees.



Recommendations

Practical Recommendations

- ❖ Consider utilizing arbitration agreements with class action waivers. Take all audits and investigations seriously from the outset and adhere to all deadlines.
- ❖ Carefully consider related issues before settling wage and hour audits and claims (private claims, tax ramifications, ACA and benefit plan implications, etc.)
- ❖ Keep accurate records of employees' hours of work, including all sleep and meal times.
- ❖ Conduct an internal wage and hour audit under the attorney-client privilege to ensure compensation practices comply with the current statutes, regulations, and case law.

Questions

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