



OVERTIME LAWSUITS THREATEN THE SENIOR LIVING INDUSTRY- What You Need to Know

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Overview of the Senior Living Industry



- State of the Industry
- Senior Living is a labor intensive industry
- Business structure of the industry
 - Business structure of the industry affects operations
 - Business structure impacts the employment relationship

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History of the Fair Labor Standards Act

- Part of FDR's Campaign pledge to address minimum wage and child labor issues
- Signed on June 25, 1938
- Basic Provisions
 - Minimum wage
 - Overtime pay after 40 worked hours
 - Prohibition on use of “oppressive child labor”
 - Each workweek stands on its own
 - Amended 1947 (“Portal-to-Portal Act”)

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Wage & Hour Law - General

- State and Local Laws
 - Most states have some laws on wages and/or hours
 - FLSA does not preempt state laws or municipal ordinances
 - Critical because workers are entitled to most favorable treatment—federal, state, or municipal
- State and Local W&H Laws Vary
 - May replicate federal law
 - Can add extra protections; e.g., rest break requirements, higher minimum wages, deadlines for wage payments, and other things
 - WARNING: 8/80 may not be valid under state laws
 - WARNING: Exemptions may vary
 - WARNING: What is “working time” may vary

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Common Issues Which Arise in Wage & Hour Litigation



- Exemptions
- Compensable Work Time
- Overtime
- Enforcement
- Litigation Issues
 - Unique form of class actions

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Coverage Issues



- Employees and not Independent Contractors are covered. Use the Economic Reality Test
- Volunteers—General Rule:
 - There is NO permissible volunteering of services to a for-profit employer.
 - **Nursing home exception:**
 - not otherwise employed by the facility
 - volunteer without expectation of pay
 - done for the comfort of nursing home residents
 - not otherwise provided by the facility
 - However, individuals (including residents) who perform work of any consequential economic benefit to the facility are employees and entitled to FLSA minimum wage and overtime.

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Who is Liable?



- Employers
- Successors
- Joint Employers
 - Interrelation of operations
 - Common management
 - Common control of labor relations
 - Common ownership or financial control

Who is Liable?



- Individual liability
 - Any person acting directly or indirectly in the interest of an employer in relation to any employee 29 U.S.C. §203.
 - This could mean individual liability for officers, participating shareholders, managers, supervisors.
 - Did the individual exercise sufficient control over significant aspects over the employer's operations?

Hours Worked



- Non-exempt employee must be paid for all time the employee is "suffer[ed] or permitt[ed] to work," whether or not required to do so.
- Employee must be paid for "all time during which the employee is required to be on duty or to be on the employer's premises or to be at prescribed workplace."
- If an employee continues to work voluntarily at the end of his shift, as long as the employer knows of or has reason to believe that the employee is continuing to work, this time is considered working time.

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Overtime



- One and one-half times ($1\frac{1}{2}$) the regular rate of pay for all hours worked over forty in any given workweek
 - What is the work week?
 - What is the regular rate?
 - When did they work?
 - For Salaried employees, can have fixed salary for fluctuating work week.
 - Overtime is then paid at one-half ($\frac{1}{2}$) regular rate for all hours over 40

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Recordkeeping



- Every employer must keep at least the following:
 - name, address, and birth date for employees under 19 years of age; sex and occupation; hour and day workweek starts; regular hourly rate for overtime; daily or weekly straight time earnings; overtime pay; deductions or additions to wages; total wages paid; and date of payment and pay period.
- For non-exempt employees, employers must also keep a specific and accurate accounting of all hours worked in each workweek
- Absence of records is a violation of the Act and creates a presumption in favor of the employee who claims they were not properly paid

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White Collar Exemptions



- Executive
- Administrative Employees
- Professional Employees
- Computer Employees
- Outside Sales Employees
- Highly Compensated > \$100,000 per year

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Salary Basis Test



- General Rule
- Employee must receive a “predetermined amount” on a weekly/bi-weekly basis
- “Predetermined amount” cannot be reduced due to quantity or quality of work performed
 - No Docking
 - Exceptions: Personal reasons; sickness or disability when employee has exhausted accrued leave; offsets for amounts received for jury, witness or military duty fees; suspensions imposed for infractions of major safety violations; or suspensions for violations of written policies/procedures

Wage/Hour Collective-Class Actions



- FLSA suits have increased by 250% since 1990, and FLSA Collective actions have increased by more than 800% since 2001.
- As FLSA cases have increased, employment discrimination suits have decreased, falling 32% since 2000.
- FLSA collective actions outnumbered all other types of private class actions in employment-related cases in 2007, 2008, and 2009.

Wage/Hour Collective-Class Action Hot Spots



- California, Florida, Illinois, New York, New Jersey, Massachusetts, Minnesota, Pennsylvania and Washington

- Why these states?
 - More onerous state laws
 - Wage Payment laws with steep penalties
 - Hungry plaintiff's bar

What is an FLSA Class Action



- Because FLSA Class actions are a collection of individual opt-ins, they are generally referred to as:
 - COLLECTIVE ACTIONS (state law cases are CLASS ACTIONS)

Rule 23 Class Actions



- RICO
- Contract Claims
- ERISA Claims
- State Law Based Unpaid Wage Claims

Why Wage & Hour Class Actions Are So Popular



- Pay policies and practices often affect *groups* of employees in a similar way
- Large recoveries: The FLSA (and state laws) provide for penalties on back pay (100% federal; 25% - 200% in some states)
- The FLSA (and state laws) allow the prevailing plaintiffs to recover their attorneys' fees when successful

Enormous Judgments



- \$187 Million – *Hummel et al. v. Wal-Mart Stores, Inc.* (Philadelphia, PA state court) (Sept. 3, 2008)
 - Off-the-clock and breaks
- \$105 Million – *Chou et al. v. Starbucks, Inc.* (San Diego, CA state court) (March 19, 2008)
 - Misclassification
- \$35.5 Million – *Morgan v. Family Dollar Stores, Inc.* (11th Cir. Affirmation) (Dec. 16, 2008)
 - Misclassification

Large Settlements



- It is estimated that in 2009, Wal-Mart settled more than 60 cases: estimates of value of settlement by Wal-Mart and Plaintiffs' counsel are \$350-\$640 Million
- *Brattain v. Richmond State Hospital* (Ind. State Court) \$42.4 million for 15,000 state employees claiming they had to work 2.5 hrs/wk extra without pay

More Large Settlements



- *Paris v. Lowes Home Improvement Warehouse, Inc.* \$29.5 million
- *In re Wachovia*, \$39 million
- *Westerfield v Washington Mutual* \$38 million

Bases for Wage & Hour Actions



- Compensable Time Cases
- Exemption Cases
- Independent Contractor Cases
- Unequal Pay (Disparate Compensation)

Compensable Time Violations



- Requiring non-exempt employees to perform tasks prior to the start of their work day.
- Requiring non-exempt employees to work through their lunch hour or while unpaid breaks.
- Requiring non-exempt employees to perform many tasks during an on-call period or after conclusion of day.

Failure to Pay for All “Hours Worked”



- Non-exempt employees must be compensated for all “hours worked”
 - At min. wage or more (if by agreement) for all hours worked < 40/wk; and at overtime rate for all hours worked > 40/wk
- “Hours worked” generally = time spent for the benefit of the employer, with employer’s knowledge, and that is considered a “principal activity,” *i.e.*, all duties, tasks, or actions that are an integral and indispensable part of the employee’s job

What Counts As “Hours Worked”?



- Single biggest wage/hour problem = properly identifying, and paying for, “hours worked”
 - Specifically: which preparatory and concluding activities are “compensable” and which are not
 - Compensable hours worked vs. preliminary/postliminary or *de minimis* activities

Preliminary and Postliminary Activities



- Activities before or after regular shift are compensable (as “hours worked”) if they are an *integral and indispensable* part of the employee’s principal activities
 - “Principal activity” is not defined, but generally includes activities that are performed as part of the employees’ regular work and in the ordinary course of the business

De Minimis Activities



- Insubstantial periods of time beyond scheduled work hours may be disregarded if they cannot be recorded as a practical administrative matter
 - Only applies when time at issue is uncertain and indefinite periods of a few minutes of duration
 - May apply if time spent by each employee on activity in question is less than 10 minutes/day
 - However, DOL's position is that all preliminary/postliminary activities must be aggregated
 - Harder to apply in work of electronic timekeeping

The Healthcare Industry Under Fire



- Who is being sued?
 - In long-term care, major firms
 - Many local cases

By Way Of Example...



- Look what's been happening in the acute care industry
- Hospital systems and multiple systems in a confined metropolitan area
 - Syracuse
 - Pittsburgh
 - Boston
 - Philadelphia
- What legal claims are being raised?
 - FLSA, State wage hour or wage payment laws,
 - ERISA
 - RICO
 - Antitrust

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Who Brings These Suits



- Law firms that specialize in Wage Hour collective actions
- Some of these firms have gone nationwide
- They look for prospective clients in a number of ways, including targeted websites
- Look at some examples

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Practical Issues Raised



- The timekeeping system used by the employer automatically deduct for a 30-minute unpaid break
 - What happens when employee works through lunch to handle a resident
 - What happens when someone calls nurse to assist after they punched out
 - What policies and procedures are in effect to pay for those who were “permitted or suffered” work

Practical Issues Raised



- Are these isolated instances or a common practice?
- If employee was not properly paid, have their benefit levels been improperly suppressed?
 - 401(k)
 - 403(b)
 - Other wage dependent benefits

Racketeer Influenced and Corrupt Organizations Act (RICO)



- We are not mobsters, are we?
- Elements of a Civil RICO claim
 - Conduct; of an enterprise; through a pattern;
 - of racketeering activity (a continuing pattern of unlawful activity by management designed to avoid paying legally owed overtime)
 - 4-year statute of limitations and treble damages

Antitrust Violations



- If I am not a mobster, am I a Robber Baron?
- The purpose of these laws is to oppose the combination of entities that could potentially harm competition, such as monopolies or cartels.
- What does that have to do with how I pay nurses?

Antitrust Violations



- Conspiracy among different employers to suppress the wages paid to a class of workers in a specific geographic area
- Conspiracy = acting in concert or combining through trade and professional associations
- Sharing cost data (wages and benefits) through salary surveys which aren't so blind
- Picking up the phone and asking your competitor "Hey, what do you do...."

Independent Contractor Cases



- Different Tests (IRS, FLSA, State laws)
- DOL – overtime compensation issues
 - ERISA benefit issues
 - State – UC and Income tax collection opportunities driven by huge budget shortfalls

Am I Sitting Duck?



- Preventative medicine works in employment law, too
- Know the laws, all of them
- Review and if necessary, revise them now
- Policies sitting in a binder are worthless, and even harmful, if management doesn't understand them, doesn't follow them and doesn't understand the consequences for not following them
- In the end your practices may dictate the outcome

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Am I Sitting Duck?



- Use of same temp employee but paid through more than one agency
- See Barfield v. New York City Health & Hospitals Corp, 537 F.3d 132 (2d Cir. 2008) (holding hospital as Joint Employer of nurse that was placed and paid through several separate nursing referral agencies)

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Am I Sitting Duck?



- Know what is permissible under each state's law
 - 8/80
 - Mandatory breaks
 - Different exemptions
 - Wage payment requirements
 - Requiring employees to stay on site during a meal break

Shore Up Your Defenses



- The Good Faith Defense
- Train your management, especially first line supervision, not to defeat the purpose of the Act
- Possibly conduct a wage-hour audit
 - Consider bringing the audit under the attorney client privilege

How Do You Resolve These Cases?



1. Choice of Counsel
2. Assessment
3. Settlement
4. Remediation

What Is An Assessment?



1. What Are You Looking For?
2. Measuring Exposure
3. Interviewing and Calculating

The Settlement Approaches



1. Stays and Tolling
2. Agreed Mediation Approaches
3. Settling the Entire Complaint

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Questions and Answers

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