



Establishing FLSA-Compliant Practices In The Home Companionship And Home Care Industry

Insights

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It is hard to believe that it has been three years now since the federal Fair Labor Standards Act's (FLSA) "companionship" exemption was strictly limited to direct-hire caregivers engaged in a narrower scope of activities, resulting in far more workers now being considered non-exempt. Not surprisingly, adapting to this limitation has not been easy, specifically for agencies who employ these home care workers and assign them to work in clients' homes. In general, all employers struggle with applying the 1938 law to the 21st century. For employers of home companion workers, though, it can feel like trying to jam a square peg into a round hole.

The FLSA requires employers to pay these non-exempt providers minimum wage and overtime premium pay. However, in most situations, simply making sure the employee is well-paid is not going to cut it. Employers must pay careful attention when evaluating employment terms and practices that developed when the industry was operating under a different set of rules. Below are some hurdles to consider and steps for overcoming them.

Timekeeping

Though timekeeping generally takes a back seat when describing FLSA requirements, it is the linchpin to compliance. Indeed, while an employee's wages might be high enough to presume the minimum wage is met, overtime cannot be determined without having an "hours worked" figure in the critical equation.

Some areas where a provider's time might be excluded from "hours worked" include travel time, meal periods, and sleep time. When budgeting labor costs and determining an employee's pay rate, there is a tendency to focus on productive (*i.e.*, "working") time and to heavily weigh the amount being charged for the service. However, this is too narrow a view with respect to non-exempt employees. While it is rare to come across situations where productive time is not considered "hours worked," there can be situations where non-productive time (for example, meetings) or times thought to not be work at all (waiting for an expected call, breaks between activities, etc.) should be included as hours worked.

You should evaluate your timekeeping practices by identifying what time you are excluding from "hours worked." From there you can determine whether each exclusion actually has a legally justifiable basis.

Minimum Wage

Besides ensuring proper timekeeping practices are observed, there are other areas where you might inadvertently violate the FLSA's minimum wage provision. Two particularly relevant to the industry are uniform deductions and other pseudo-deductions.

Though you might allow ample variety in terms of color and style when it comes to required items, many are still considered "uniforms." In fact, for wage-hour purposes, simple items that contain a logo, specified shoes not normally used for street wear, and non-branded items can constitute uniforms.

Deductions for uniforms, special cleaning processes, and similar business expenses cannot bring an employee's wages below the minimum wage (or cut into any portion of the employee's pay for hours worked over 40). Moreover, these limitations apply whether a deduction is made through payroll, a "pseudo"-deduction through accounts payable, or even having the employee independently incur the cost.

You should run a payroll report that identifies all deductions. For those not legally required (taxes), employee requested (401(k)), or business-related (vehicle usage, for example), you should determine whether a minimum wage violation has occurred.

Overtime

Besides the timekeeping burden and obvious increased cost, paying home companion workers an overtime premium is no simple task. An employer might pay these providers at an hourly, daily, weekly, or per-visit rate, but in all cases must still pay the overtime premium (the extra "half-time" portion) for all hours worked over 40 in a workweek. Moreover, you must include most additional payments in the "regular rate" calculation when determining the applicable half-time rate for a particular workweek, including payments such as varying hourly rates (maybe a lower rate—still above minimum wage—for travel), a shift differential (night work), or an attendance bonus (incentivizing an employee to work as scheduled).

Accordingly, an employee's rate for purposes of overtime will typically vary every workweek unless they are paid purely on a single-rate hourly basis. You should run a payroll report that identifies all earnings, including any other amounts or perks (for example, speculative allowances or reimbursements, cash bonuses, or even contests). You should then evaluate each category to determine whether there is a basis for excluding it under the particular circumstances and, if not, how overtime should be calculated.

Conclusion

In sum, the industry has made it through the tough part: it has scrambled to convert home companion workers to non-exempt status under the FLSA. But any changes still necessary to achieve compliance should be made sooner rather than later, before you inadvertently continue or develop non-compliant practices.

There are many more details to consider, including wage-hour and wage-payment requirements based on the location of employment, but these first steps will start you on your way to FLSA compliance, provide you with a better foundation for tackling location-specific nuances, and avoid landing in the middle of costly and stressful litigation.

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