

THE 12 BIGGEST PERILS WITH “PER VISIT” COMPENSATION PLANS FOR HOMECARE WORKERS – AND WHAT EMPLOYERS CAN DO TO OVERCOME THEM

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To better assure profitable homecare visits and encourage higher productivity, many homecare employers compensate field staff on a “per visit” or “fee for visit” basis. While utilizing this kind of compensation system is generally permissible, it is riddled with potential perils and risks. This is especially true when compensation plans involve many types of visits among different disciplines, non-visit activity time, and travel to and from patient residences. What are the 12 biggest perils you might face with such a system, and what can you do to overcome these challenges?

Quick Background

While pay models vary – points-based, fee-visit based, etc. – these fee payment practices are extremely commonplace in the homecare industry. They better allow homecare employers to maximize the potential for profitability by assigning a (nearly) fixed cost to the patient visit. Doing so can also promote productivity and efficiency among field staff.

For example, assume a Physical Therapist completes a standard physical therapy visit. Homecare employers paying Physical Therapists on a per-visit basis will then compensate that worker at some pre-determined fixed monetary rate for completing the patient visit, regardless of whether the visit takes 45 minutes or 75 minutes, for example. That pre-determined fixed rate is traditionally some amount less than the applicable reimbursement rate for that visit (or series of visits), which – at least in theory – better allows homecare employers to assign a fixed cost for

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the visit, which is not dependent on how long the clinician spends inside the patient's home.

"I Can Do That?"

The federal Fair Labor Standards Act (FLSA) permits employers, under certain circumstances, to compensate exempt and non-exempt employees on a fee basis. "Fee basis" means that an employee is paid an agreed sum for a single job regardless of the time required for its completion.

What does this mean in plain English? Well, assume the same Physical Therapist mentioned above earns \$35 per standard physical therapy visit and \$60 for each assessment visit. If they complete four standard physical therapy visits in one day and two assessment visits in one day, they are – subject to certain potential caveats noted below – entitled to gross compensation of \$260 for that day $((\$35*4) + (\$60*2))$ regardless of whether it takes them six or eight hours to complete the six total visits.

Too Good to Be True?

Like many things in wage and hour law, paying visiting or field employees a simple pre-determined rate and multiplying that rate by the number of visits or points is admittedly not as simple as it might initially seem. Such compensation models are riddled with nuances and considerations necessary to assure compliance.

Per-visit pay models are also subject to greater scrutiny by the Department of Labor and unsuspecting plaintiffs' attorneys who may not understand the legal authority or nuances of such compensation practices. Consequently, a key piece in developing, implementing, or maintaining a per-visit pay model is to assure that the actual compensation model and pay plan are legally intact – both in theory and practice. To do so, it is important to first understand the risks.

The 12 Biggest Perils in Using A Per-Visit Compensation Model

As mentioned above, per-visit pay models can have many benefits to homecare employers. And, if such pay models are developed, communicated, implemented, and applied correctly, the benefits generally outweigh any risks. In fact, a per-visit pay model that is adequately and correctly

developed, communicated to employees, implemented appropriately, and applied in practice does not present a greater legal risk than a simple hourly pay plan as both are compliant with the law.

Understanding the perils of per-visit pay plans is vital – perhaps, paramount – to structuring such plans in a way that minimizes the inherent wage and hour-related risk. The 12 most objectively common perils that you might face:

- 1. Failing to Develop a Compliant Compensation Plan:** A written and legally compliant compensation plan is vital to outlining a transparent basis of compensation. It should be objective, detailed, and all-encompassing. It should explain all activity types – both visit- and non-visit related (i.e., training, meetings, etc.) – for which the visiting employee is being compensated. Under the FLSA, you can define such pay to cover all visit-related tasks (like scheduling calls, driveway calls, charting, etc.), or even more broadly define it as covering all hours worked in related and unrelated activities, including training, meetings, rest breaks, etc. Some states, like California and Oregon for example, either prohibit paying employees on a per-visit basis or make it so difficult to do so that such models become too cumbersome and prohibitive of the goal in the first place. Thus, employers with operations in several states or nationally must recognize state nuances and avoid shoehorning a one-size-fits-all approach to any per-visit pay model.
- 2. Failing to Train Employees on the Compensation Plan:** Training employees on the compensation plan is vital to educating employees transparently on their pay, per-visit or points earning, and associated tasks that may be included in each visit or point. Training non-exempt employees is also crucial in explaining the importance of tracking all time worked and the expectations and requirements of doing so, including for break and travel time throughout the day. You should also make the compensation plan and any training available to employees to revisit as needed.
- 3. Failing to Understand the Difference Between Exempt and Non-Exempt:** Classifying an employee as exempt from overtime does not necessarily make it true. Instead, employees still must meet certain criteria to be exempt from overtime, regardless of their title. Failing to properly classify employees as exempt or non-exempt can have

lasting reverberations and increase legal exposure exponentially.

- 4. Failing to Adhere to the Fee Basis or Salary Basis Test for Exempt Employees:** Even paying exempt employees on a per-visit basis or pursuant to a points-based model still requires additional tests be met to qualify for the exemption. If truly paid on a fee basis, an exempt employee's wages must result in a rate that, were the employee to work 40 hours, would meet the minimum weekly threshold (currently \$844 per week).
- 5. Failing to Account for Different Visit and Non-Visit Activity Types:** As homecare employers know, not all visits and activities are the same. Admissions are different than reassessments. Lab drops are different than patient care conference meetings. Thus, you should carefully assess each activity in developing your compensation plan and account for different per-visit rates or point values depending on the task(s) at hand.
- 6. Failing to Track All Non-Exempt Employee Hours Worked For Minimum Wage and Overtime Purposes:** Paying non-exempt homecare workers on a fee basis does not absolve the requirement to still track all hours they work. Tracking hours is required to maintain things like benefit accruals, minimum wage and overtime compliance. For example, without knowing the number of hours worked by each non-exempt field clinician (even if paid on a fee basis), it is impossible to determine whether they earned enough compensation in each workweek to comply with the applicable minimum wage rate (since workweek earnings must at least equal the applicable minimum wage across all hours worked) and their overtime earnings.
- 7. Failing to Properly Calculate Overtime:** Calculating overtime due and owed to non-exempt per-visit field staff can be difficult. Under the FLSA, employers must calculate the regular rate for each workweek, which is typically done by adding together the total pay for each workweek (including any incentive bonuses or other non-discretionary pay earned during the workweek) and divide that by the total hours worked during the workweek. This will provide the weighted regular rate. To determine the overtime pay, employers must: (1) divide the regular rate in half (the reason being is that the employee paid on a fee-basis would have already been

compensated for the overtime hours at straight time pay via their per-visit rate); and (2) multiple the half-time rate by the number of overtime hours worked during the workweek to determine the overtime premium due. This is a highly nuanced process with many moving parts, which is often why the Department of Labor assesses violations to homecare employers who are not paying proper overtime to non-exempt per-visit field employees.

8. Failing to Consider Continuous Workday Issues: The FLSA's continuous workday rule requires employers who pay non-exempt employees on a fee basis to track all hours during the continuous workday. The "continuous workday" is the period between the commencement and completion on the same workday of an employee's principal activity or activities and includes almost all time within that period, regardless of whether the employee engages in work throughout that period. This typically means that all hours from the first activity to the last – excluding unpaid, off-duty and uninterrupted lasting at least 30 minutes – must be tracked for purposes of overtime and minimum wage compliance. This can present difficulties for homecare employers employing field clinicians who may engage in non-visit related tasks before the first or after the last visit or variably start or stop their day.

9. Failing to Consider Meal Break Issues: Many states require employers provide uninterrupted meal breaks to employees. This includes non-exempt field staff. This can present difficulties for homecare employers whose field staff work in the field, often traveling from one patient visit to the next without supervision and with an incentive to finish their day as early as possible. You should understand the state and local requirements regarding meal breaks and take appropriate steps to assure employees are provided and are taking meal breaks as required. Requiring employees to eat in their car while traveling between visits may not be enough. Even if sufficient to meet a state law meal break requirement, it is unlikely that the time could be excluded from hours worked for purposes of minimum wage and overtime.

10. Failing to Properly Handle On-Call Time: Homecare clinicians, regardless of how they are paid, are often required to participate in an on-call rotation. Pay practices among on-call staff vary wildly. However, it is important to properly consider not only what might constitute

compensable on-call time, but also how on-call pay is factored into the calculation of the regular rate for overtime purposes and minimum wage compliance.

11. **Failing to Audit:** Even with the most sophisticated compensation model and pay plan, failing to audit payroll data and critically review wage and hour practices among field staff and per-visit employees can lead to unforeseen issues. You should approach wage and hour compliance and re-approach it regularly to identify issues before it is too late.
12. **Failing to Document Adjustments:** Depending on the type of software utilized or the type of timekeeping method used, you should take appropriate steps to document any adjustments to employee time, whether it be due to error, an employee forgetting to transmit paperwork, or missed visits to name a few.

What to Do?

Whether you are considering paying field employees on a per-visit basis or currently doing so, it is vital to do it correctly. You should take the following steps in either scenario to maximize legal compliance:

1. Critically develop a comprehensive compensation model with assistance of experienced counsel who understand the intricacies of visiting field staff and per-visit pay plans.
2. Train (and retrain) employees on the compensation model and all applicable wage and hour policies and document such training.
3. Stay vigilant on compensation issues and legal changes.
4. Re-evaluate the compensation model regularly to address nuances, problems, and issues.
5. Audit payroll records periodically to spot potential issues and to assure employee compliance.
6. Partner with counsel experienced in such compensation models regularly to maintain compliance.

Conclusion

We will continue to monitor wage and hour developments and provide updates, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the author of this Insight, any attorney on our [Healthcare Industry Team](#), or in our [Wage and Hour Practice Group](#).