I will always remember 2014 as the year of the “Companionship Exemption Vortex”. As of this writing, it is still not completely clear whether and to what extent these changes to the companionship services exemption under the federal FLSA (Fair Labor Standards Act) will remain in place. A lawsuit by the HCAOA and others‡ has managed to at least delay the implementation of key aspects of the U.S. Department of Labor’s (“DOL’s”) changes impacting home care. Meanwhile, a tremendous amount of time, energy and money has gone into figuring out how to cope with potentially losing this exemption from minimum wage and overtime pay.

For us, this actually started in late 2013 when California effectively took the plunge a year earlier than federal law changes by requiring agencies to pay caregivers state minimum wage and overtime pay starting January 1, 2014. As 2014 progressed and the rest of the country began gearing up for the federal changes to take effect January 1, 2015, I had many opportunities to talk with agency owners and staff as they adjusted to an entirely new playing field in terms of home care wage and hour laws.

Roughly speaking, the concerns that I’ve encountered fall into two categories: cost and risk.

Cost and Risk

Paying overtime and travel time to caregivers who are not exempt from minimum wage and overtime pay requirements changes the whole cost structure of the industry. If you have caregivers working well over 40 hours a week on a regular basis, the cost difference can be huge. Reducing scheduled hours, lowering base rates, eliminating certain service lines and raising bill rates are the most common approaches taken to mitigate the impact.

Risk of lawsuits, from disgruntled employees and enterprising attorneys to the DOL itself, is the other side of the trouble coin. One of the biggest problems is the lack of clarity. When exactly do we have to pay overtime and travel time? At what rates? In other words, how does the rather simple-minded structure of these regulations map onto the not-so-simple realities of home care? How can agencies be confident that they are in compliance when the rules are so poorly defined for our industry? Shining a light on the details is an excellent way of quelling the uneasiness and getting some sleep at night.

There is far more to this topic than I have space for here, but I’ll offer a distillation of some of the elements of two of the main pieces of the puzzle, Overtime and Travel Time for nonexempt caregivers.
Overtime

The concept of Overtime seems fairly straightforward at first glance, but it is actually a remarkably complex subject. This is especially true in an industry like ours where caregivers may work for different rates of pay on different shifts and where live-in services enter the picture.

According to the FLSA, all nonexempt caregivers must be paid “one-and-a-half times their regular rate of pay” for all hours worked over 40 in a workweek††. What is their “regular rate of pay”? If you use the rate of whichever shift(s) happen to be at the end of the workweek (the ones that “caused” the overtime), you could end up under- or over-paying significantly. Averaging of the rates for the whole week, with weighting based on how many hours at each rate is much more compliant, but can be hard to understand. The easiest way to think of it is: (1) add up the total amount of remuneration (i.e., all money paid for work) in a workweek; and (2) divide by the total number of hours worked in the workweek. The sum of this equation is the caregiver’s “regular rate of pay” for that workweek. In other words, that’s the averaged rate for the week.

One confusing side effect of this approach is that, often, caregivers will have a different Regular Rate of Pay each week for calculating overtime pay. This is an example of another significant challenge: communicating clearly with your caregivers about things that you might barely understand yourself!

Billing for Overtime

Agencies that I’ve talked with vary widely in how they approach billing for Overtime. Do you pick and choose which clients are billed overtime, or do you spread the costs out among all clients? Do you just bill the extra payroll expense that has to be paid to the caregiver (i.e. pass along the cost) or do you use an increased bill rate (1.5 times the client’s normal bill rate), or something else?

Many will do some combination of these, as the circumstances require. Some will just choose to raise their overall rates and never directly bill Overtime to the clients. This simplifies things and avoids difficult conversations, like explaining to clients why they have to help pay Overtime when they have fewer than 40 hours of service in a week themselves.

Travel Time

Nonexempt caregivers who work for multiple clients during their workday should be paid for travel time between shifts. That does not typically include travel to the first shift from home, nor from the last shift back home (this is just commuting). Travel time should be paid based on the time it would take to drive from Shift A to Shift B. According to DOL, if travel is not direct because the caregiver is relieved from duty long enough to engage in purely personal pursuits, only the time necessary to make the trip between clients must be paid. And Travel Time should be counted toward the weekly total of hours worked when calculating Overtime.
It may not always be easy to determine when travel time must be paid. One approach some agencies are taking is to set a window of time between shifts; if the 2nd shift starts within that window, it gets travel time. This makes good common sense in most cases, but consensus seems to be that this is not safe, since it does not seem to comply with DOL’s interpretation of how to pay travel when long breaks are involved.

The approach that seems to comply with DOL’s interpretation is to pay for all travel between shifts on the same calendar day regardless of long breaks. This may work well in many situations, but not in all. Take the example of a caregiver who regularly works overnight shifts. Say the caregiver works 10p-8a and 8:30a-9:30a every day. In this scheme, the caregiver would get travel time pay for traveling between both shifts each calendar day without any commuting time built in. Someone who works 8:30a-9:30a and again from 10a-8p would only be paid travel time for the travel between one shift each calendar day. This caregiver’s morning drive to the client at 8:30a and evening drive home at 8p is commute time. The fact that the first caregiver’s shift crosses the midnight boundary artificially makes all travel time worthy of compensation if the “workday” is a calendar day.

Unfortunately, the question of how to pay for a nonexempt caregiver’s travel time when long breaks are involved in their “workday” remains a murky issue at this time. The good news is that travel time between clients may be paid at minimum wage rates, which can help offset some of these new payroll expenses.

**Conclusion**

Complying with wage and hour laws can be daunting and confusing, but by paying attention, doing your homework and getting help when needed, you can find your way through it. Document the policies and the thinking behind the policies so that you have a clear story and can make a good case for being in compliance.

**Disclaimer**

The opinions expressed here are the personal opinions of the author. This information is offered for perspective; it in no way constitutes a recommendation or legal advice about what is right for your agency. We strongly recommend that you speak with a knowledgeable wage and hour law attorney to be sure you remain compliant.

**Footnotes and attributions:**

‡ Home Care Association of America et. al. v. Weil et. al., case number 1:14-cv-00967 (RJL) in the U.S. District Court for the District of Columbia. The District Court’s rulings on December 22, 2014 and January 14, 2015 allow agencies to use the federal companionship services exemption the same as in the past. However, DOL has appealed these decisions, which poses liability risks if the appellate court or US Supreme Court rules in DOL’s favor and applies DOL’s changes retroactively to January 1, 2015.
Many states and local municipalities have their own laws regarding minimum wage and overtime pay, including daily overtime pay requirement in addition to a weekly one. When they differ, agencies essentially will be expected to comply with whichever wage and hour law is more beneficial to the caregiver.

Department of Labor FLSA site: http://www.dol.gov/whd/flsa/
Department of Labor’s Homecare site: http://www.dol.gov/whd/homecare/

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