



How Employers Can Reduce Risk of Being Targeted in Home Health Care Misclassification Suits

Plaintiffs' wage-and-hour class action lawyers are constantly looking for new groups of employees whom they can claim are inappropriately classified as exempt. In previous decades, plaintiffs' lawyers focused on mortgage adjusters, truck drivers, and assistant store managers. In 2019, plaintiffs' lawyers are directing their attention to another group of employees: home health clinicians.

Employers are now seeing a new set of class action lawsuits alleging that companies have improperly classified skilled care clinicians (registered nurses, occupational therapists, physical therapists, and speech language pathologists) as "exempt" from the overtime requirements of the federal Fair Labor Standards Act ("FLSA") and parallel state laws. Among other claims, these lawsuits allege that employers are paying clinicians on a "per visit" basis for patient visits and on an hourly basis for other work, resulting in denial of regular pay and overtime for work-related tasks, such as preparing for patients visits, traveling between patients' homes, documenting information from patient visits ("charting"), and coordinating patient care with other providers.

Of course, FLSA misclassification suits are not new, but some of the tactics the plaintiffs' lawyers are using are unusual. For example, some plaintiffs' firms are using the same plaintiff to sue multiple companies. Some are using an opt-in plaintiff from one lawsuit to sue another company in a second lawsuit. And some are settling a lawsuit with a company on an individual basis, only to sue the same company with a second plaintiff, alleging an entirely new class claim.

Every lawsuit presents its own challenges. But there are some precautions companies can take to minimize the risk of these new claims and enhance the defensibility of any claims that do arise. These include:

- **Specifically evaluate each position to ensure that the position is appropriately classified as exempt or nonexempt under the FLSA and applicable state laws.** Do not assume that a position is exempt merely because it resembles another position; do an individualized analysis of that position. An individualized analysis will make the determination more defensible and assist in preventing multi-position class certification.
- **Ensure that any exempt employees are paid on a salary basis, not an hourly basis.** Any employee paid on an hourly basis will likely be considered nonexempt – even if that employee's duties would qualify as exempt work.
- **For those employees classified as nonexempt, carefully review their travel arrangements,** so as to ensure that those employees are appropriately paid for any travel time after the start of their workday.
- **Consider adopting arbitration provisions with class action waivers for all employees.**
- **For positions with greater risk (particularly entry level clinician positions) consider obtaining an opinion letter regarding the exempt status of that position.** Such a letter is the best possible defense against a claim of a willful violation and to demonstrate good faith.
- **Periodically audit your exempt classifications** to ensure they remain appropriate under applicable federal and state laws and regulations.

These precautions can help an employer avoid misclassification class action claims and make it easier to defend those that do arise.



Joe Schmitt
612.305.7577
jschmitt@nilanjohnson.com



Mark Girouard
612.305.7579
mgirouard@nilanjohnson.com



Joel O'Malley
612.305.7747
jomalley@nilanjohnson.com