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March 3, 2015

The FLSA and Nursing Care Facilities – Unique Challenges



While most businesses are subject to the Fair Labor Standards Acts' ("FLSA") overtime and minimum wage requirements, skilled nursing facilities, assisted living facilities, and nursing homes (collectively "Nursing Care Facilities") face unique challenges when attempting to comply with the FLSA's requirements. In fact, a Department of Labor survey conducted in 2000 showed that **84%** of nursing homes were in violation of the FLSA's overtime provisions. See <http://www.dol.gov/whd/healthcare/surveys/nursing2000.htm>. Violations of the FLSA can be costly. If found to be in violation, an employer will be liable for all of the past overtime owed, liquidated damages (which effectively doubles the amount owed), and attorney fees. 29 U.S.C. § 216(b). If not handled quickly and effectively, oftentimes the attorney fees can far outweigh the actual damages. To avoid these costs, Nursing Care Facilities need to continually ensure that they are in compliance with the FLSA.

Live-In Care Staff

Recently, a Central Florida ALF, Alta HealthCare Group, Inc. ("Alta"), was sued by a live-in care provider for violations of the FLSA's overtime provisions. "Florida regulations require ALFs to have at least one staff member certified in cardiopulmonary resuscitation ("CPR") on-site at all times." *Maldonado v. Alta Healthcare Grp., Inc.*, No. 6:12-CV-1552-ORL-36, 2014 WL 1661265 (M.D. Fla. Mar. 26, 2014) *citing* Fla. Admin. Code Ann. r. 58A-5.0191(4). To comply with this requirement, Alta hired a staff member at each of its facilities to reside at the ALF. This staff member was expected to perform regular duties when scheduled during the day shift (8:00 a.m. to 8:00 p.m.), and, if an issue arose, provide

services during the night shift (8:00 p.m. to 8:00 a.m.). Alta considered any night issues to be minor and non-compensable because the staff "benefited from the 'implicit value' of not having to pay living expenses." *Id.* Due to these working conditions, Norma Maldonado, a live-in care staff member, filed a lawsuit alleging FLSA overtime violations.

The Court stated that, due to the fact-specific nature of arrangements involving residing on the employer's premises, employers and employees were free to construct reasonable agreements regarding compensation. *Id.*, *citing* 29 C.F.R. § 785.23. However, the Court stated, "to be reasonable, employees must be compensated for **any actual interruptions in sleep** and, moreover, **no more than eight hours of sleep time** may be deducted for each 24-hour on-duty period." *Id.* *Emphasis added.* The Court held that because Alta's agreement did not compensate Maldonado for the interrupted sleep and because it attempted to deduct more than 8 hours of sleep time, it was unreasonable and unenforceable. *Id.*

With the agreement unenforceable, the Court then went on to determine if there were any overtime violations. The Court found that, because Maldonado put notes in each resident's file every time she had an issue during the night shift, Alta had constructive knowledge of her work and was required to pay for that time. *Id.* Further, while Alta could claim the value of the residence as compensation, its mere assertion that the value was worth \$1,085.00 was not sufficient and it would need to provide more evidence as to the reasonable value of the residence if it wished to apply that amount towards compensation. *Id.*

Shortly after the Court made this ruling, the parties settled. There are three key lessons to be taken from this case. First, employers

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should always ensure that working hours are recorded and properly compensated. If a Nursing Care Provider knows or should know that an employee is working, that person is entitled to compensation. Second, if a Nursing Care Provider has live-in staff, it needs to have an agreement with the employee that complies with all of the applicable regulations to be enforceable. If a Court determines that the agreement is not enforceable, the Nursing Care Provider will be liable for all uncompensated time. Third and finally, if a Nursing Care Provider plans on compensating an employee in ways other than monetarily, it needs to have an objectively reasonable and factually supported basis to determine the value of that compensation.

8 and 80 Rule

In general, an employer is required to pay its employees one and one-half times their regular rate of pay for every hour worked over 40 hours in a work week. 29 U.S.C. § 207(a)(2). However, due to the unique issues faced by health care providers when it comes to staffing, the FLSA includes a second option for calculating overtime – the 8 and 80 rule. The 8 and 80 rule allows Nursing Care Facilities, with the agreement of the employee, to calculate overtime on a 14-day basis as opposed to a 7-day basis. While there are exceptions, the agreement should be in writing, signed by the employee, and kept in their file. See 29 C.F.R. § 778.601(c). When overtime is calculated under the 8 and 80 rule, an employee is entitled to one and one-half times their regular rate of pay for any hours worked over 8 in one day **and** any hours worked over 80 in the fourteen day period. See 29 U.S.C. § 207(j). Further, premium pay for daily overtime under the 8 and 80 system may be credited towards the overtime compensation due for hours worked in excess of 80 for that period. 29 C.F.R. § 778.601(d).

For example, take this employee’s two week timesheet:

	Week 1	Week 2
Sunday	8	
Monday	8	16
Tuesday	8	
Wednesday	8	
Thursday	8	8
Friday	8	
Saturday	8	

During this two week period, the employee worked a total of 80 hours, 56 hours on Week 1 and 24 hours on Week 2. Under the standard overtime rules, the employee would be entitled to 16 hours of overtime pay for Week 1. However, under the 8 and 80 rule, the employee would only be entitled to 8 hours of daily overtime for Monday of Week 2 and, since the total number of hours worked for the two week period did not exceed 80 hours, the employee would not be entitled to any additional overtime for the two week period. In this situation, the 8 and 80 Rule saved the employer 8 hours of overtime pay.

The 8 and 80 rule can provide much needed flexibility to Nursing Care Providers when it comes to staffing. However, this rule adds another layer of complexity to an already complex system of rules that employers must follow. Nursing Care Providers that wish to implement the 8 and 80 rule should consult with an experienced employment law attorney to ensure that they are in compliance with the FLSA.

Conclusion

Complying with the FLSA can prove a difficult challenge for any organization. The unique situations presented by Nursing Care Facilities only amplify those challenges. Further, the cost of non-compliance is incredibly high. Not only will the facility be liable for double damages, it will be liable for the employees’ attorney’s fees. And, with 80% of

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Nursing Care Facilities out of compliance, the potential for liability is huge.

Many Nursing Care Facilities don't want to incur the fees of an experienced FLSA attorney to ensure that they are in compliance. However, failure to comply with the FLSA can result in the facility paying not just their attorney fees, but the attorney fees of their employees. If you are a Nursing Care Facility and you need help understanding or dealing with a FLSA issue, contact us a Smith & Associates for a free consultation.

Susan C. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of health care law for over 15 years.