New Federal Wage & Hour Rights for Home Care Workers

Litigating under the New USDOL Companionship Rules

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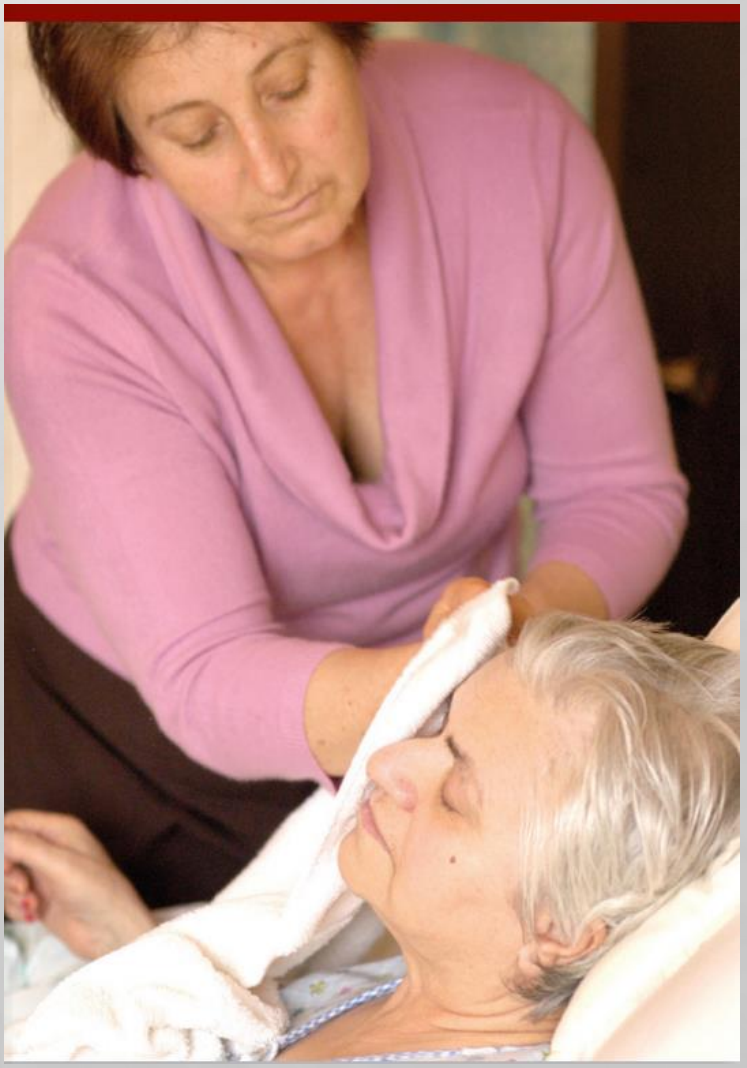
Who are home care workers?

Two occupations: Home Health Aides & Personal Care Aides/ Attendants

Work structures: (1) Employed by home care agency; (2) Medicaid-funded Independent Provider programs; (3) Employed directly by household.

Work in a private home: Workers employed in facilities like group homes or assisted-living facilities were not subject to the companionship exemption before the rules reform.



History of the exemption

- 1974: Congress extended FLSA rights to domestic workers, the "thousands of ladies who have the sole responsibility for taking care of their families and will not be able to adequately support their families" (Rep. Shirley Chisholm). 29 USC § 202(a), 206(f), 207(l).

- Two exceptions: for "casual babysitters," and for workers who provide "companionship services" to the elderly and disabled. 29 USC §213(a)(15), (b)(21).

- 1975: DOL issued regs defining "companionship services" –overly broad rules come to encompass most in-home services, including work performed for 3rd party employers.

"Fair Pay for Home Care Workers" (NELP 2011).

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Effects of the exemption

- 2 million home care workers exempt from federal wage protections.
- Fastest-growing workforce earns only around $10/hr.
- State-level protections are spotty, often violated, and rarely enforced. Stats: 17.5% suffer minimum wage violations; 83% overtime violations; 90% off-the-clock violations.
- Workforce demographics: 90% women, disproportionately women of color, over half on public assistance.
- Home care consumers hurt by high turnover, worker shortages.

When reached for comment, the agency's President, Yvonne McMillan, did not deny the charges, but said employees no longer worker more than 40 hours a week. "We just haven't paid overtime," she said. The business did not afford us to. It's no mystery in this industry."

-Home Care Service Sued Over Pay Practices,
Crain's New York Business (4/14/10)

The new rules

- Change ***who*** may claim the exemption:
  - ✓ Third party employers may not claim either the companionship or live-in domestic worker exemptions;
  - ✓ Individuals, families or households may still claim the companionship and live-in domestic worker exemptions (if the worker meets the new test).

- Change ***what*** counts as exempt "companionship services".

- Change recordkeeping requirements for live-in workers.

➢ Regulations affected: 29 CFR § 552.3, -.6, .101, .103, .106, .109, .110.
➢ Final Rule: http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=27104
➢ Existing FLSA rules on travel time, sleep time, joint employment, now apply to HCWs.
See http://www.dol.gov/whd/homecare/

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New definition of exempt "companionship services"

- "Companionship services" is defined as the provision of **fellowship** and **protection**.
- Includes the provision of **care** if the care is provided along with fellowship and protection and does not exceed 20% of total weekly work hours.
- "Companionship services" does **not** include domestic services provided primarily for benefit of other members of the household, or **medically related services.**

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Which workers are still exempt?

- Worker must be ***solely*** employed by individual or household – if there is any third-party joint employer, like an agency or a state, she is not exempt.

And

- Spend 80% or more of her weekly work hours on fellowship and protection, and 20% or less of her weekly work hours on care.

All other HCWs covered by FLSA as "domestic service employees".

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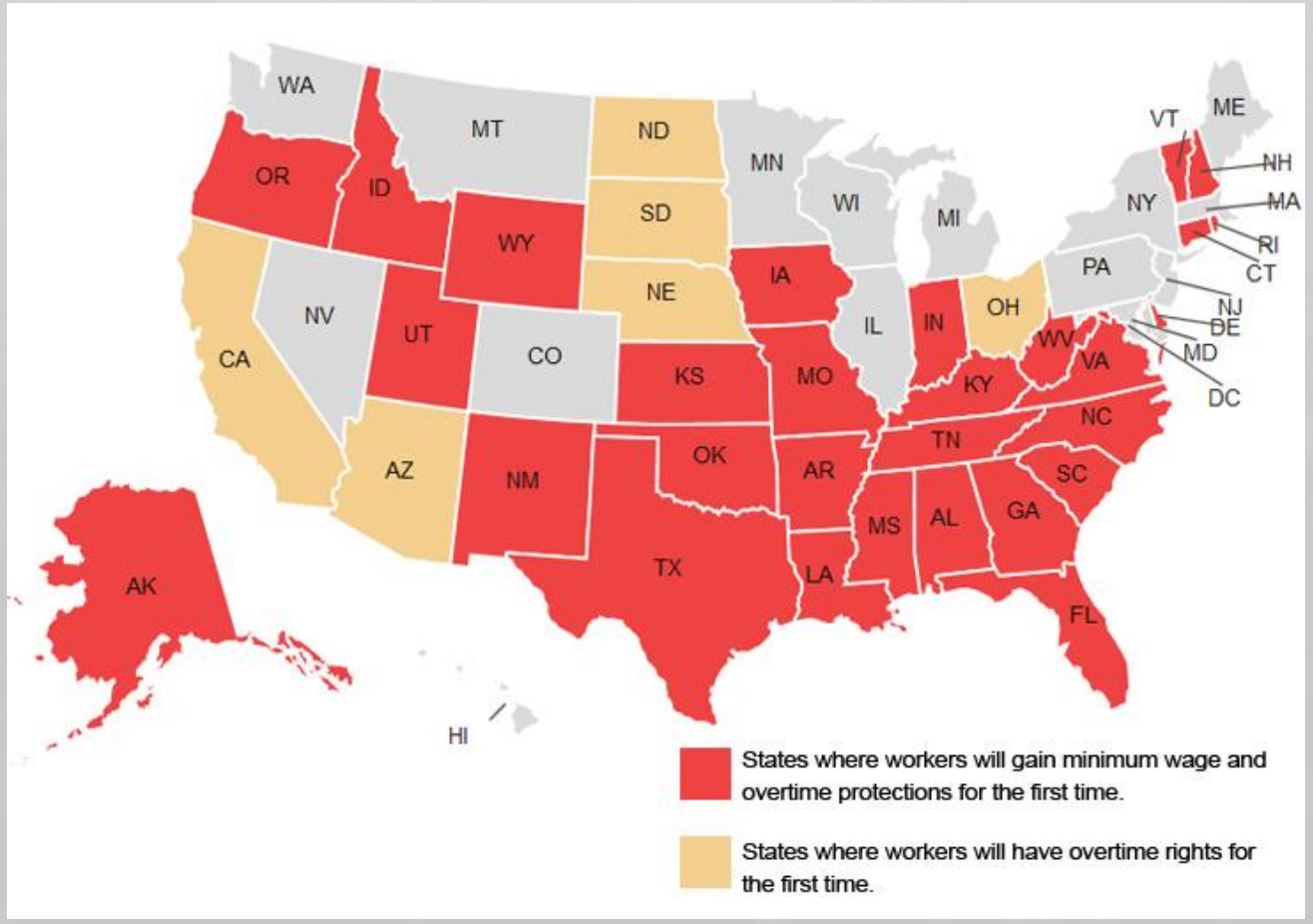
State Wage Rights



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State – Federal Law interactions to watch

- In some states, coverage tracks FLSA definitions and exemptions. Ex.s:
  - ✓ Florida "Only those individuals entitled to receive the federal minimum wage under the [FLSA] and its implementing regulations shall be eligible to receive the state minimum wage…" Fla. Stat. § 448.110 (3).
  - ✓ New York overtime level pegged to federal exemptions "…employees subject to section 13(a)(2) and (4) of [FLSA], overtime at a wage rate of one and one-half times the *basic minimum* hourly rate." 12 NYCRR 142-2.2.

- In some states workers covered by a higher state MW rate and/or have better remedies.

- Some states have better minimum wage rate but no state overtime rule.

- City and state living wage laws. Ex.s: NY Wage Parity Law, DC Living Wage Law.

- UI and WC exemptions in many states.

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NELP webpage on the rules:
http://www.nelp.org/campaign/implementing-home-care-reforms/.

National Wage & Hour Clearinghouse:
http://www.just-pay.org/

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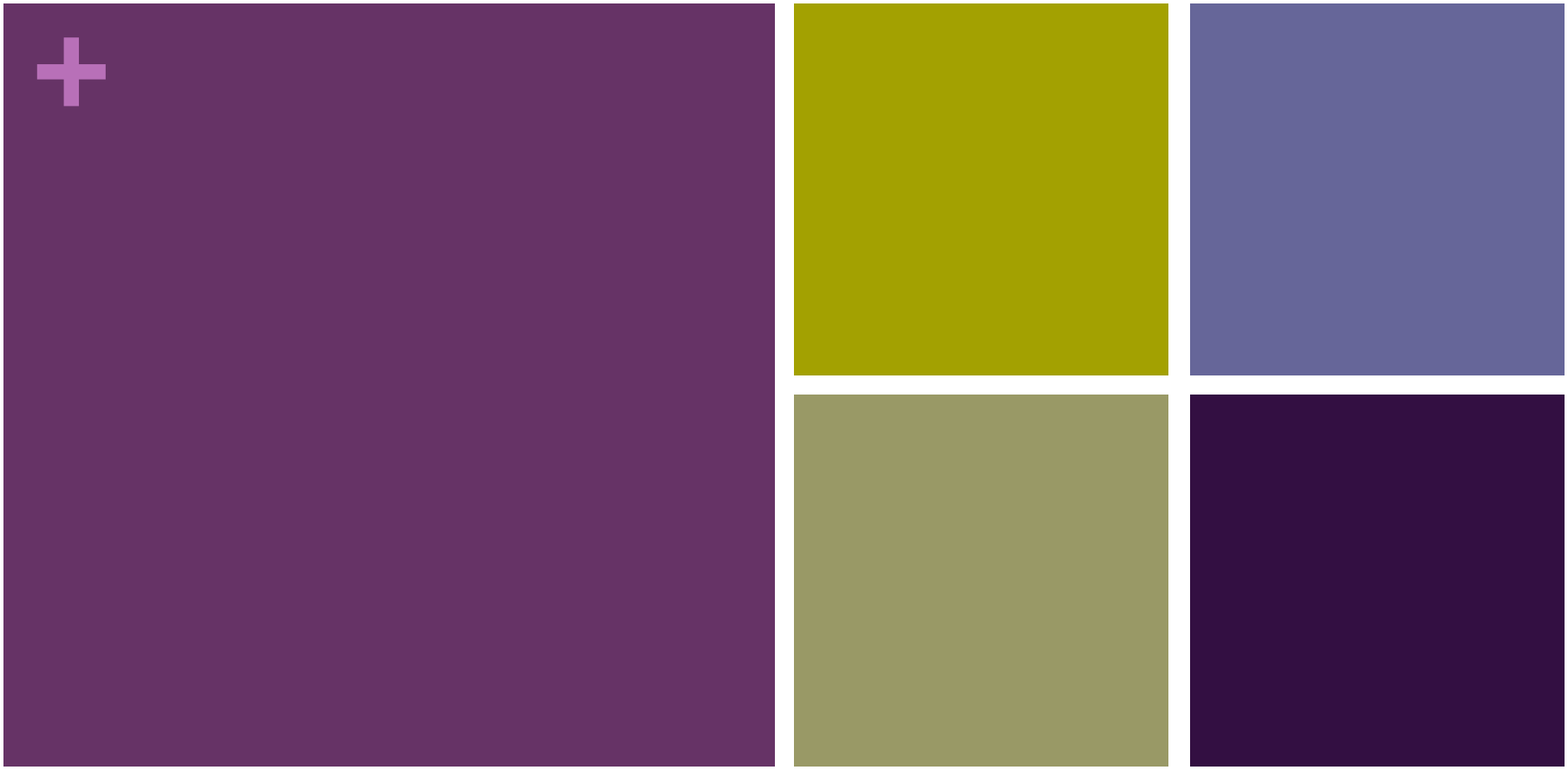

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Litigating under the new Companionship Rule:

Overarching Issues

Overarching issues

- Litigation and implementation timeline
- D.D.C. rulings and their effect
- Effective date of rule
- Limitations on suing states

FLSA: HCAA v. Weil timeline

DDC vacates third party employer reg December 22, 2014

DDC vacates companion ship services reg January 14, 2015

DOL appeals to D.C. Cir. January 27, 2015

D.C. Cir. reverses DDC Unanimously affirming validity of rule August 21, 2015

SCOTUS denies emergency stay of mandate October 6, 2015

D.C. Cir. mandate issues October 13, 2015

DOL discretionary non-enforcement ends December 31, 2015

Effect of D.D.C Rulings

- On 12/22/14 the district court struck down the third-party employer exemption (29 CFR 552.109).
- On 12/31/14 the district court issued a TRO temporarily delaying the remainder of the rule, the narrowed definition of "companionship services" (29 CFR 552.6).
- On 1/14/15, the district court vacated the narrowed definition of "companionship services" (29 CFR 552.6).
- Other parts of rule remained.
- Applicability beyond D.C. –
  - Single district court judge in D.C.
  - Cases could have proceeded in other districts/circuits
- Parties to case –
  - Plaintiffs = Home Care Association of America, International Franchise Association, National Association for Home Care & Hospice
  - Defendants = DOL, Secretary Perez, Administrator Weil

Rule's Effective Date

- Litigation did not alter the effective date of rule, *January 1, 2015.*
  - Private litigants may have claims back to January 1, 2015.
- Other parts of rule not addressed by D.D.C orders.
- DOL position –
  - Enforcement actions back to October 13, 2015.
  - Limited by D.D.C. orders before then.

Limitations on suing states:

- Where state is joint-employer with consumer
  - "Consumer-directed" programs
  - Liability for state (e.g. travel time between consumers)
- 11th Amendment Immunity
  - Bars suit by private citizen in federal court.
  - FLSA – *Alden v. Maine*, 527 U.S. 706 (1999)
  - Does Not bar actions by DOL.
- Exceptions -
  - State may consent to suit in federal court.
  - Suit against state employees in individual capacity.
  - Political subdivisions and other entities within state not immune.

Sleep Time

New York State Department of Labor Opinion Letters

A 2010 letter proposes a 13-hour pay methodology for **“Live-In”** employees who are provided 3 hours for meal breaks and are afforded 8 hours of sleep.

Sleep Time

New York State Department of Labor Opinion Letters

THE LETTERS NEVER DEFINE WHO IS A "LIVE-IN" EMPLOYEE

Sleep Time

"Sleep-In" "Live-In" or "Residential"?

Severin v. Project Ohr, Inc., 10 Civ. 9696(DLC), 2012 WL 2357410 (S.D.N.Y.June 20, 2012)

Sleep Time

Finds the Opinion Letters not applicable and refuses to follow *Severin.* Finding that a putative class of Home Health Aides should be paid for all 24 hours of the 24-hour shifts they worked. Presently on appeal before the New York Appellate Division, Second Department.

Andryeyeva v. New York Health Care, Inc., 45 Misc. 3d 820, 827-28, 994 N.Y.S.2d 278, 285-86 (Sup. Ct. 2014)

Sleep Time

Defendants continued reliance upon the federal court's decision in *Severin v. Project Ohr, Inc.*, 10 Civ. 9696(DLC), 2012 WL 2357410 (S.D.N.Y.June 20, 2012), which this Court declined to follow, is misplaced for the reasons previously articulated in my Decision of February 19, 2013. Similarly, defendants' contention that the practice in the industry of paying for fewer than 24 hours worked by a non-residential aide, and the use of "live-in" as a synonym for "sleep-in" during a 24-hour shift, is somehow dispositive of the legal issues regarding the enforcement of New York Labor Law, is rejected.

Andryeyeva v. New York Health Care, Inc., 45 Misc. 3d 820, 828, 994 N.Y.S.2d 278, 286 (Sup. Ct. 2014)

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Sleep Time

As pointed out by plaintiffs, they allegedly maintain their own residences and do not live in the home of defendant. Thus, even though the Opinion Letter states that it applies the same test to all live-ins, whether residential or non-residential employees, plaintiffs are allegedly not live-ins.

Lai Chan v. Chinese-Am. Planning Council Home Attendant Program, Inc., No. 650737/2015, 2015 WL 5294803, at *7 (N.Y. Sup. Ct. Sept. 9, 2015)

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Joint Employers: The Structure of the Industry in New York

CHHAs

In New York the state contracts with Certified Home Health Agencies (CHHAs) to provide home health services to Medicare and Medicaid recipients.

Joint Employers: The Structure of the Industry in New York

LHCSAs

CHHAs do not directly provide home health aide services to clients; rather, they subcontract this part of their business to Licensed Home Care Services Agencies (LHCSAs).

Joint Employers: Joint Employer Analysis in New York

Zheng v. Liberty Apparel Co. Inc., 355 F.3d 61 (2d Cir. 2003)

In *Barfield the court* applies the *Zheng* factors to analyze joint employment in a case involving nursing assistants. *Barfield v. New York City Health & Hospital Corp*. 432 F.Supp.2d 390 (S.D.N.Y. 2006), *affirmed*, Barfield v. New York City Health & Hospital Corp., 537 F.3d 132 (2d Cir. 2008)

Joint Employers: Joint Employer Analysis in New York

Moreno v. Future Care Health Servs., Inc., 43 Misc. 3d 1202(A), 992 N.Y.S.2d 159 (Sup. Ct. 2014)

Denying defendant's motion to dismiss the claims of Home Health Aides against CHHA

"... It would be a situation if I needed a home health aid, I would call Americare [CHHA] and say I need a home health aid because Americare represents the people that require the services and Americare contracts with Future Care [LHCSA] and Future Care provides home health aids to Americare's clients.

Again, *Americare has complete control over them* and Future Care, again, provides their insurance, makes sure they are certified. Future Care hires and trains them, orients them"

Mandatory Arbitration Agreements and Class and Collective Action Waivers

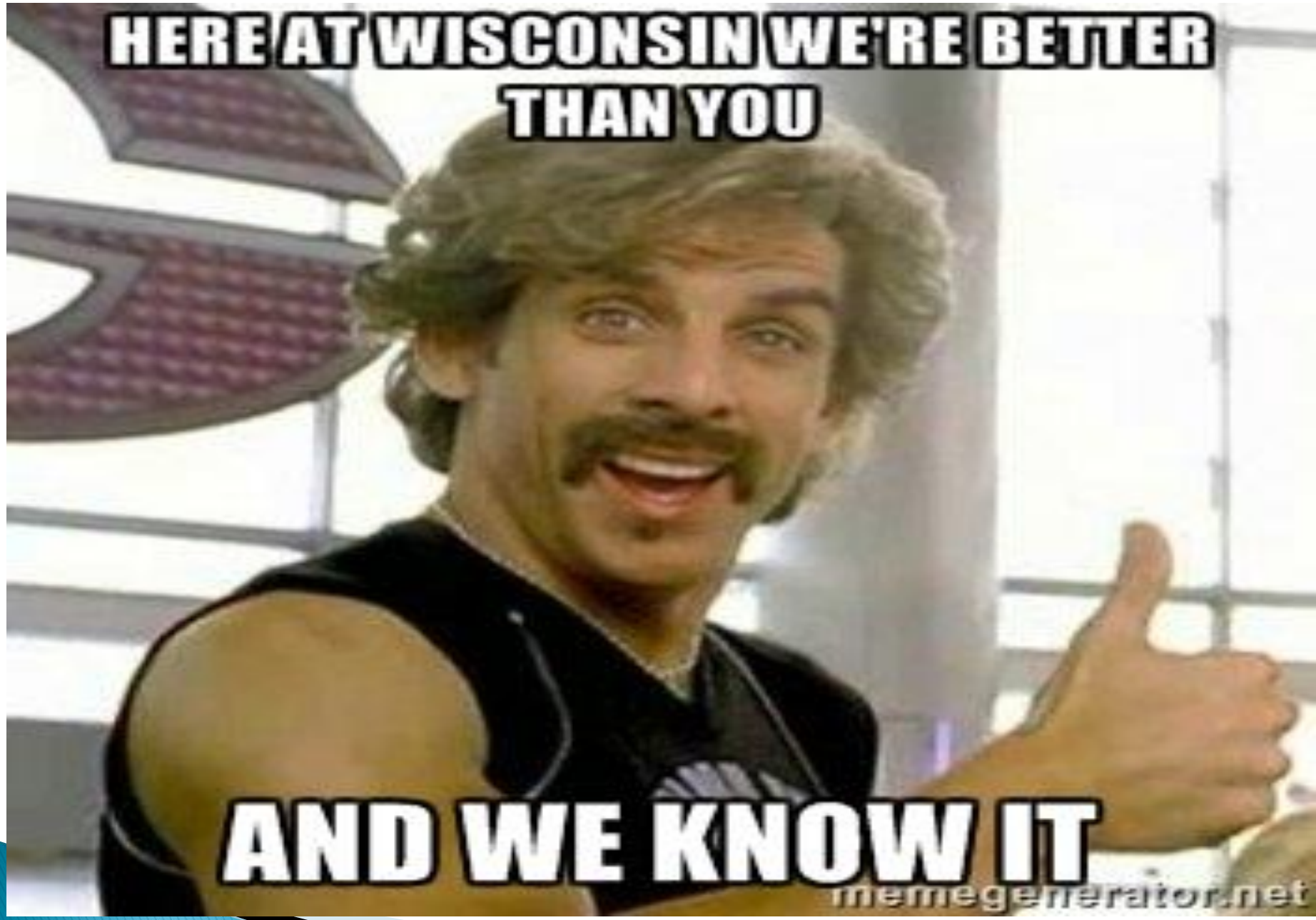
"New York home care employers should strongly consider implementing an arbitration program with a class action waiver in order to avoid the cost and expense of a class action lawsuit."

https://www.littler.com/new-york-state-supreme-court-finds-24-hour-home-care-attendants-must-be-paid-sleep-and-meal-periods

Mandatory Arbitration Agreements and Class and Collective Action Waivers

The 5th Circuit overturned D.R. Horton but the NLRB continues to find that such agreements violate the NLRA.

Murphy Oil USA, Inc. v. N.L.R.B., No. 14-60800, 2015 WL 6457613, at *4 (5th Cir. Oct. 26, 2015)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Mandatory Arbitration Agreements and Class and Collective Action Waivers

- I am not persuaded that the board's decision is incorrect. The reasoning followed by the board is straightforward: (1) under the NLRA, "[e]mployees shall have the right to ... engage in ... concerted activities for the purpose of ... mutual aid or protection," 29 U.S.C. § 157, and employers may not "interfere with, restrain, or coerce employees in the exercise of" that right, 29 U.S.C. § 158(a)(1); (2) both courts and the board have found consistently that lawsuits for unpaid wages brought by multiple plaintiffs may be one type of "concerted activity" protected by §§ 157 and 158(a)(1); (3) an employer interferes with an employee's right to engage in concerted activities by requiring her to sign an agreement that includes a prohibition on collective actions by employees; (4) there is no conflict between the Federal Arbitration Act and the NLRA because the Federal Arbitration Act does not require the enforcement of arbitration agreements that conflict with substantive provisions of federal law. *In re D.R. Horton, Inc.,* 357 NLRB No. 184 (2012), available at 2012 WL 36274.

- *Herrington v. Waterstone Mortgage Corp.,* 993 F. Supp. 2d 940, 943 (W.D. Wis. 2014)

State Law Protections

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STATE WAGE LAWS

- Remember → check state law as a source of additional protections;
- Maryland law never had exemption for all HCWs and state wage law allows *treble* damages and fees;
- HCWs also traditionally considered covered employees under UI, with some exceptions for workers who are essentially independent contractors.

Independent Contractor Misclassification

Rule of Thumb: *Is the worker in business for herself or dependent on the Agency*?

Factors:

- ❑ The degree to which the worker's services are integral to Agency's business
- ❑ The worker's opportunity for profit or loss, e.g., assigned clients at hourly rate vs. negotiating
- ❑ Relative financial investment in the work vs. the Agency's
- ❑ Ability to use independent judgment and special skill vs. following Agency rules or policies
- ❑ Relative permanence of work for this Agency
- ❑ Extent to which Agency controls key aspects of job, e.g., hours, duties, client assignments

Why Does It Matter?

Employee Protections v. IC Responsibilities

- ICs pay *both* employer- and employee-side of FICA and FUTA, currently 15.3% of pay, and income tax. Employees pay only half that.
- ICs carry their own workers' compensation, professional liability insurance, and any other insurance or licensing requirements for businesses.
- ICs must pay estimated business taxes on a quarterly basis (plus annual return), and figure out individualized self-employment tax deductions and credits.
- ICs are **NOT** protected by wage laws, unemployment insurance laws, or protection against discrimination.

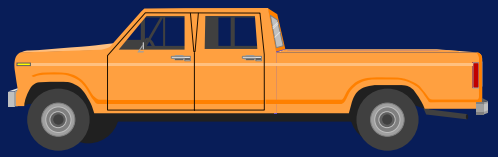
Off-The-Clock Issues

Preparatory and Concluding Activities

- May be compensable if:
  - Activity is integral and indispensable to the employee's principal activity.
  - An activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.
- Examples
  - Charting, visit preparation, scheduling, follow-up calls, no-shows, etc.
  - Capped time reporting.

Off –The-Clock Issues

Travel Time



- Home to work is not work time, even if in company vehicle
- Travel between sites during work day is work time
- On a one-day trip out of town, time in excess of ordinary commute is work time
- In overnight travel out of town, travel during regular working hours is work time, regardless of whether weekend or week day
- But: Time as a passenger outside regular hours is not work time on overnight trips
- All work during any travel is work time

Off-The-Clock Issues

Meal Periods and Rest Periods

- **Meal periods are not work if:**
  - **They are 30 minutes or longer**
  - **Uninterrupted**
  - **Employee is free from all duties**
- **Rest Periods:**
  - **Are generally considered work time if between 5 and 20 minutes.**

Thank you!

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