



  
**NY LABOR UPDATES**  
*Monthly Webinar Series:  
October 1, 2015*



 **About Guest Speakers**

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**WAGE AND HOUR  
UPDATE**

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## A Time of Significant Challenge

- ❖ Continued Class Action Wage and Hour Litigation
- ❖ Loss of Federal Companionship Exemption
- ❖ Increase in New York Minimum Wage
- ❖ Amendments to the “White Collar Exemptions”
- ❖ Challenges to the NYS DOL 13-Hour Rule for Live-In Aides
- ❖ Joint Employment Guidance
- ❖ Common Compensation Errors



## Wage and Hour Lawsuits

- ❖ Plaintiffs' attorneys continue to aggressively pursue Class Action wage and hour claims
- ❖ Year over year, federal wage and hour lawsuits filed in federal courts continue to increase. As of September 2014, wage and hour filings increased from 7,500 to 8,160 per year (almost a 9% increase).
- ❖ The 8,160 figure appears to be an all-time high for FLSA filings. It is the highest annual number registered in more than 20 years, according to statistics that go back to 1993, when 1,457 FLSA cases were commenced.





**Wage and Hour Violations are Costly and Potentially Expose Owners and Officers to Personal Liability**

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<b>Potential Wage and Hour Penalties</b>		
<b>Federal Fair Labor Standards Act</b>	<b>New York Labor Law (civil complaint)</b>	<b>New York Labor Law (administrative complaint)</b>
Back pay	All unpaid wages	All unpaid wages
Liquidated damages equal to 100% of back pay	Liquidated damages equal to 100% of the unpaid wages	Liquidated damages equal to 100% of the unpaid wages
Fines	Pre-judgment interest on the unpaid wages at a 9% annual rate	Interest on the unpaid wages at 16% annual rate
Willful violations of the FLSA may result in criminal prosecution and the violator fined up to \$10,000. A second conviction may result in imprisonment.	Employers who fail to pay wages in accordance with the provisions of the Labor Law, and the officers and agents of any corporation who knowingly permit such failure, are guilty of a misdemeanor for the 1st offense and a felony for the 2nd offense	Employers who fail to pay wages in accordance with the provisions of the Labor Law, and the officers and agents of any corporation who knowingly permit such failure, are guilty of a misdemeanor for the 1st offense and a felony for the 2nd offense
Civil money penalties (CMPs) up to \$1,100 for each violation for repeated or willful violations of the FLSA.	Attorneys' fees, unless the civil action is brought by the NY DOL on behalf of individuals	Civil penalty of up to 200% of the unpaid wages if the employer willfully or egregiously fails to pay wages.
Attorneys' fees or injunctive relief	Litigation costs	An additional 15% in damages if the employer does not comply with the compliance order within 90 days



**Elimination of the Federal  
Companionship and Live-In  
Domestic Service Exemptions**

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## Final Rule Eliminating the Companionship & Live-In Domestic Service Exemptions

- ❖ On October 1, 2013, the Department of Labor promulgated a Final Rule that made a number of important changes to the companionship and live-in domestic service exemptions under the FLSA. Most notably, the Final Rule eliminated these exemptions for “third-party providers” of home care services.
- ❖ As a result of this change, home care agencies that employ home health aides will be required pay overtime at the rate of 1.5 times each aide’s “regular rate of pay,” rather than 1.5 times the minimum wage.
- ❖ The Final Rule does not change the DOL’s regulations regarding “hours worked” by employees during travel time, sleeping, meal periods, and time spent waiting.

## Final Rule Litigation

- ❖ In *Home Care Association of America v. Weil*, a number of home care industry groups challenged the Final Rule.
- ❖ On December 22, 2014, the U.S. District Court for the District of Columbia vacated the third-party provider section of the Final Rule, thereby allowing “third party providers” to continue to rely upon the companionship and domestic service exemptions.
- ❖ On August 21, 2015, the U.S. Court of Appeals for the D.C. Circuit reversed the District Court’s ruling, unanimously upholding the validity of the Rule.



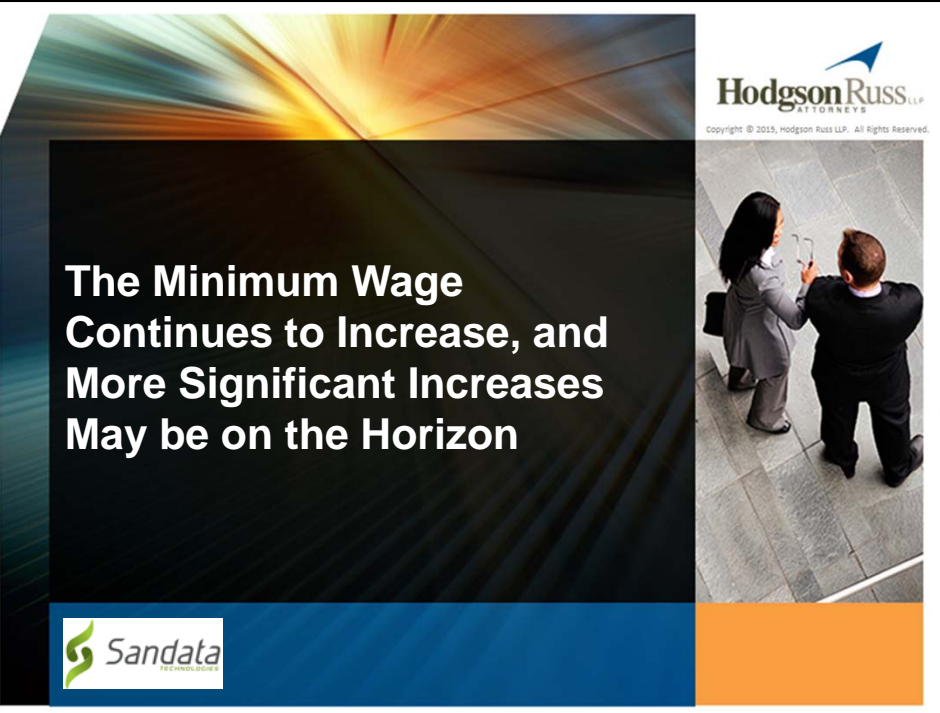
## Final Rule Effective Date

- ❖ The Department of Labor has made clear that it will not begin enforcement of the Final Rule until the Court of Appeals issues a mandate (in this case, by default, the mandate would issue 52 days after the Court of Appeals decision).
- ❖ But the Department has now filed an application to expedite the issuance of mandate and simultaneously promised not to enforce the Final Rules until 30 days thereafter.
- ❖ Meanwhile, the home care industry litigants that challenged the Rule have applied for a stay of the mandate until the Supreme Court decides whether to hear an appeal of the case.
- ❖ What about risks of private litigation?



## Moving Forward

- ❖ While possible, it is statistically unlikely that the Supreme Court will agree to hear the industry groups' appeal.
- ❖ Absent further regulatory, legislative or judicial action, home health agencies must be prepared to pay home health aides overtime at 1.5 times their regular rate of pay (rather than 1.5 times minimum wage).



**The Minimum Wage  
Continues to Increase, and  
More Significant Increases  
May be on the Horizon**



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## New York Minimum Wage

- ❖ Currently \$8.75 per hour (higher for Wage Parity covered cases)
- ❖ As of December 31, 2015: \$9:00 per hour
- ❖ On September 10, 2015, the Acting Commission of Labor for New York issued an order approving an increase in the minimum wage for fast food workers. This order will result in a series of increases to the minimum wage for fast food workers, ultimately resulting in a \$15 per hour rate as of December 31, 2013 in New York City and July 1, 2021 in the rest of the State.
- ❖ On the same date, Governor Cuomo announced that he wants to raise New York's minimum wage for all workers to \$15 per hour, which would make it the highest in the nation. A statement issued by the Governor's office stated that it will endeavor to build support for a new minimum wage bill in the coming months, and that the bill would be introduced in the next legislative session.



## United States Department of Labor Proposes Significant Changes to Regulations Governing "White Collar" Exemptions



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## Amendments to the “White Collar” FLSA Exemptions

- ❖ On March 13, 2014, President Obama issued a Presidential Memorandum directing the Secretary of Labor to issue updated regulations regarding the “white collar” overtime exemption regulation and consider how they could be revised to:
  - Update existing protections in keeping with the intention of the Fair Labor Standards Act.
  - Address the changing nature of the American workplace.
  - Simplify the overtime rules to make them easier for both workers and businesses to understand and apply.



## Proposed “White Collar” Changes

- ❖ On June 30, 2015, the U.S. Department of Labor released a proposed rule that would amend the “white collar” exemptions.
- ❖ If adopted, the proposed rule would dramatically increase the minimum salary level for the executive, administrative, and professional exemptions from \$455 per week (\$23,660 per year) to a projected \$970 per week (\$50,440 per year).
  - For New York employers, the current minimum salary level for administrative and executive employees is \$656.25 per week (\$34,125 per year).
- ❖ The proposed rule would also increase the minimum salary level for the “highly compensated” employee exemption from \$100,000 per year to \$122,148 per year.



## Proposed “White Collar” Changes

- ❖ Additionally, the DOL has proposed indexing these minimum salary levels to either wage growth or inflation, and adjusting them annually.
- ❖ The DOL is considering indexing the minimum salary level for executive, administrative, professional, and computer employees to the 40th percentile of earnings for full-time salaried workers, and to the 90th percentile for highly compensated employees.
- ❖ Alternatively, the DOL is considering indexing these minimum salary levels to the consumer price index for urban consumers (CPI-U).



## Proposed “White Collar” Changes

- ❖ Interestingly, the proposed rule does not seek to amend the duties tests applicable to the white collar exemptions.
- ❖ Instead, the DOL is seeking public comment on whether the duties tests are working as intended to screen out employees who it does not believe are bona fide exempt employees.
- ❖ The DOL expressed concern that, in some circumstances, the current duties tests allow employees to be classified as exempt where they are performing “a disproportionate amount” of nonexempt work.



## Status of Proposed “White Collar” Changes

- ❖ The DOL stated that it would not extend the time for interested parties and stakeholders to file comments, and true to its word, the 60-Day comment period closed on September 4, 2015.
- ❖ The DOL received 247,064 timely comments (an additional 42,854 have been submitted after the deadline).
- ❖ The DOL is aiming to have these changes become effective in first quarter 2016.
- ❖ The DOL estimates that, as a result of these changes, 4.68 million employees who are currently treated as overtime exempt will, without intervening action by their employers, become eligible for overtime pay in the first year the rule is in effect.



## Challenges to 13-Hour Rule for Live-In Aides



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## Litigation of 13-Hour Rule

- ❖ Under the longstanding NYS DOL rule, live-in home health aides may be compensated for 13 hours per day provided they receive 8 hours of sleep (5 of which must be uninterrupted) and 3 hours for bona fide meal periods per 24-hour shift.
- ❖ Courts considering this issue include:
  - In September 2014, *Andryeyeva v. New York Health Care*, the Supreme Court, Kings County, found that sleep and meal periods must not be excluded from a home attendant's hours of work where the attendant does not "reside" in the home of his or her client. The court therefore certified a class of over 1,000 attendants who worked 24-hour shifts.
  - And in September 2015, in *Lai Chan v. Chinese-American Planning Council Home Attendant Program*, plaintiffs sought compensation for every hour of each 24-hour shift. The defendant home care agency moved to dismiss the class action complaint, in part, on the basis of the Department of Labor's longstanding 13-hour rule. The court rejected the home care agency's motion to dismiss and suggested that live-in aides are "entitled to 24 hours pay."



## Litigation of 13-Hour Rule



- ❖ The analysis of both the *Lai Chan* and *Andryeyeva* decisions have centered on the interaction between New York Department of Labor's regulation and its opinion letters interpreting that regulation.
- ❖ The regulation at issue provides that employees must be paid for the time they are permitted to work or are required to be available for work, but that "a residential employee—one who lives on the premises of the employer—shall not be deemed to be permitted to work or required to be available for work: (1) during his or her normal sleeping hours solely because such employee is required to be on call during such hours; or (2) at any other time when he or she is free to leave the place of employment." The regulations do not contain a similar sleeping time carve-out for non-residential employees.
- ❖ The Department of Labor, however, has issued opinion letters stating that it would apply the 13-hour rule to both residential and non-residential employees. Despite the Department's interpretation of its own regulation, the courts in *Lai Chan* and *Andryeyeva* have permitted these cases to proceed.





## Overtime

- ❖ General Rule. Employers must pay all non-exempt employees 150% of their “regular rate of pay” for each hour worked in excess of 40 in a workweek.
- ❖ Regular Rate. An employee’s “regular rate” of pay is normally calculated by dividing the total pay for employment (except for those payments expressly excluded) in any workweek (or 14-day period, as applicable) by the total number of hours actually worked.



## Determining the “Regular Rate”

- ❖ The regular rate includes: shift premiums or differentials, nondiscretionary bonuses, payments for meals, lodging, and facilities, longevity payments, and retroactive pay increases.
- ❖ The regular rate does **not** include: pay for expenses incurred on the employer’s behalf, true premium pay for work on Saturdays, Sundays, and holidays, or hours worked in excess of eight in a day, discretionary bonuses, payments for occasional periods when no work is available due to vacation, holiday, or illness, pension and welfare contributions to a third party, and profit-sharing plan contributions.



## Common Overtime Violations

- ❖ Overtime pay violations often occur when employers:
  - Fail to pay employees for all hours worked
  - Fail to pay overtime after 40 hours worked
  - Fail to count the time spent “on-call”
  - Fail to include shift differential, bonuses, commissions, or on-call fees in calculating an employee's regular rate
  - Fail to pay overtime to non-exempt, salaried employees (e.g., clerical staff, cooks, and activities directors)
  - Improperly classifying employees as exempt
  - Providing compensatory time off instead of paying overtime
  - Fail to pay overtime to employees who perform exempt duties but are not paid on a salary basis (e.g., an RN who is paid hourly)



## Off-the-Clock Work

- ❖ An employer must compensate its employees for work that is not expressly authorized if the employer knew or should have known that it was being performed.
- ❖ In contrast, an employer is generally not required to pay for time worked when the employer did not know, and had no reason to know, that the work was being performed.



## Preliminary & Postliminary Time

- ❖ Activities that are preliminary or postliminary to employees' principal activities are compensable if those activities are both "integral and indispensable" to the "principal activity" for which the worker is employed.
- ❖ "Indispensable" has been defined as "necessary," and "integral" activities have been described as those "essential to completeness, organically joined or linked, or composed of constituent parts making a whole."



## Sleeping Time

- ❖ General Sleeping Time Rule. An employee must be paid for all hours on duty, even though he or she is permitted to sleep or engage in other personal activities when not busy. However, if an employee is completely relieved from duty (i.e., he or she is able to use the time effectively for his or her own purposes) and is able to take a duty-free, uninterrupted break period of at least 30 minutes in duration (e.g., a relief employee is provided), the time need not be compensated.
- ❖ Sleeping Time Rule for Aides. The general rule is followed, unless the aide is required to be on duty for 24 hours or more, in which case the NY DOL has opined that the employer and the employee may agree to exclude a bona fide regularly-scheduled sleeping period of not more than 8 hours, so long as adequate sleeping facilities are furnished by the employer. But as noted, this rule has been called into question by the courts.



## Meal Periods

### ❖ Rules Regarding Meal Periods

- All employees must be provided with an uninterrupted, duty-free meal period of at least 30 minutes in duration when they work more than 6 hours and their shift spans the period from 11 a.m. to 2 p.m.
  - ✓ This meal period must be taken between 11 a.m. and 2 p.m. and employees must be permitted to leave their workstations.
- Employees who work more than 6 hours in a shift that starts between the hours of 1 p.m. and 6 a.m. must receive an uninterrupted, duty-free meal period of at least 30 minutes in duration.
- If an employee is employed for a period starting before 11 a.m. and continuing after 7 p.m., he or she must be provided an additional meal period of at least 20 minutes in duration between the hours of 5 p.m. and 7 p.m.



## Meal Periods

- ❖ General Rule. Duty-free, uninterrupted meal periods of at least 30 minutes in duration need not be compensated as work time. An employee is not relieved from duty if he or she is required to perform any duties, whether active or inactive, while eating. For example, an employee is “on duty” when they must be in the home and prepared to provide services when required.
- ❖ Aide On Duty for Less than 24 Hours. If an aide is completely relieved from duty (able to use time effectively for his or her own purposes) and able to take an uninterrupted meal period of at least 30 minutes in duration (e.g., a relief employee is provided to cover during meal break), the time need not be compensated.
- ❖ Aide On Duty for 24 Hours or More. The NY DOL has opined that an employer and an aide may agree to exclude bona fide meal periods of no more than 3 hours. If a meal period is interrupted by a call to duty, the meal period will not be considered bona fide. Where there is no express or implied agreement regarding meal periods, the aides’ meal periods constitute hours worked. Again, however, this rule has been called into question by the courts.



## Travel Time

- ❖ Home-to-Work Travel
  - Generally not compensable as hours worked when an employee reports to work in employee’s regularly assigned work area.
  - If a direct care worker travels to the first work site directly from home, and returns directly home from the final work site, this travel time generally does not need to be paid.
- ❖ From Job Site to Job Site (Travel “All in a Day’s Work”)
  - Compensable. An aide going from one patient to another during the workday must be paid for the travel time between the patients.
  - If the travel is not direct because the employee is relieved from duty long enough to engage in purely personal pursuits (e.g., eat, shop), only the time necessary to make the trip is generally compensable.



## Travel Time

### ❖ Out-of-Town Travel

- Overnight travel away from home community. Time spent traveling, to the extent it cuts across the employee's normal working hours, is compensable. A direct care worker who accompanies a patient on travel away from home must be paid for all time spent traveling during the employee's normal work hours.
- Home-to-Work Travel on special one-day assignment. Travel time is generally compensable.



## Time Spent in Training, Lectures, and Meetings

- ❖ Attendance at lectures, meetings, training programs, and similar activities is generally considered compensable time, unless all of the following criteria are met
  - Attendance is outside of the employee's regular working hours;
  - Attendance is in fact voluntary;
  - The course, lecture, or meeting is not directly related to the employee's job; and
  - The employee does not perform any productive work during such attendance.



## Split-Shift Pay

- ❖ Employees are entitled to an additional hour of pay at the minimum wage rate for any day where the working hours are not consecutive.
- ❖ Working hours are not considered consecutive where there is an intervening period of more than one hour during the workday



## Spread-of-Hours Pay

- ❖ Employees are entitled to an additional hour of pay at the minimum wage rate for any day in which the interval between the beginning and end of the employee's workday exceeds 10 hours.
- ❖ The interval between the beginning and end of an employee's workday includes time off for meals and intervals off duty.



## Call-In Pay

- ❖ An employee who, by request or permission, reports to work on any day shall be paid at least the lesser of:
  - 4 hours at the basic minimum wage rate; or
  - the number of hours in the employee's "regularly scheduled shift" at the basic minimum hourly rate.
- ❖ Call-in pay is due regardless of whether an employee is "called in" or simply reports for work as scheduled. It may be more useful to think of this requirement as a shift minimum wage which ensures that employees are paid a set minimum amount for each day they report for work.
- ❖ Call-in pay obligation is determined on a workweek basis.



## Important Limitation on Splits, Spreads, and Call-In Pay

- ❖ All that is required is that the total weekly wages paid be equal to or greater than the total due for all hours worked at the minimum wage and overtime rate (as applicable), plus one additional hour at the minimum wage for each day in which a "spread" and/or "split" occurs.
- ❖ For "call-in" pay, if the amount actually paid to the employee for the workweek exceeds the total of all hours worked at the minimum wage and overtime rate (as applicable), plus any call-in pay owed, no additional payment for call-in pay is required for that workweek.



## Practical Recommendations

- ❖ Consider utilizing arbitration agreements with class action waivers. Note that the courts and the NLRB have been at odds with regard to the legality of these agreements.
- ❖ Take all audits and investigations seriously from the outset and adhere to all deadlines.
- ❖ Carefully consider related issues before settling wage and hour audits and claims (private claims, tax ramifications, ACA and benefit plan implications, etc.)
- ❖ Keep accurate records of employees' hours of work, including all sleep and meal times.
- ❖ Conduct an internal wage and hour audit under the attorney-client privilege to ensure compensation practices comply with the current statutes, regulations, and case law.



## THANK YOU!

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**WAGE AND HOUR  
UPDATE**

Sandata  
*October 1, 2015*




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**SANDATA OVERTIME AND  
SLEEP-IN TRACKING FEATURES**

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## System Options

- ◆ Review the email sent on 9/11 or 9/16.
- ◆ **Overtime:** Sandata has a feature to warn/prevent users from scheduling overtime hours.
- ◆ **Sleep-in Task Options:**
  - Option 1: Summary of task for sleep-in visits.
  - Option 2 (Exception basis): Summary of tasks for sleep-In visits when the aide did not receive their designated time.
  - Option 3: Detailed tasks for sleep-in visits:
  - Option 4 (Exception basis): Detailed tasks for sleep-in visits when the aide did not receive their designated time.

Please email additional questions to [ACE@sandata.com](mailto:ACE@sandata.com) .

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