


Worker Classification

An Area of Growing DOL Enforcement




Robert W. Markette, Jr., CHC May 3, 2023

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NOTE:


- The materials and opinions presented by the speaker at this session represent the speaker's views, are for educational and informational purposes only, are not intended to be legal advice and should not be used for legal guidance or to resolve specific legal problems. The speaker expressly reserves the right to advocate other positions on behalf of clients. In all cases, legal advice applicable to your organization's own specific circumstances should be sought.



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The Current Enforcement Environment


- Need to be sure you are complying with the FLSA.
- Enforcement has increased significantly.
 - DOL continues to focus on homecare providers.
- Non-compliance will be very expensive.
 - Back wages to employees.
 - Liquidated damages (DOL may seek these in an investigation)
 - Attorney fees and costs (DOL may seek these as well)



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The Current Enforcement Environment


- ◆ DOL considers health care to be a “Low Wage, High Violation” industry.
- ◆ In FY2022, DOL recovered \$32.5 Million in back wages for healthcare workers.
- ◆ On November 16, 2022, DOL announced that it had recovered \$1.2 Million in back wages for 599 homecare workers from 4 different HHAs in TX.
- ◆ “The majority of the home healthcare industry’s workers are women of color and despite the critical work they do—and the tremendous compassion and commitment they show—their hourly wage rates remain among the lowest in the nation.” explained Southwest Regional Wage and Hour Administrator Betty Campbell.
- ◆ Of course, this fails to take into account stagnant reimbursement rates.



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The Current Enforcement Environment


- ◆ February 15, 2023, DOL recovers \$380,000 in back wages for 126 employees of 2 home health companies.
 - ◆ Issue: one company failed to aggregate hours for employees; other company just didn't pay OT premium.
- ◆ February 7, 2023, Federal Court in Illinois ordered Midwest Home Care to pay \$1.1 Million in back wages and damages.
 - ◆ Issue: Agency paid a “daily rate” regardless of hours worked.
 - ◆ Workers were in the home for more than 24 hours at a time.
 - ◆ Failed to comply with Sleep Shift rule as well.
- ◆ January 24, 2023, Federal Court in Pennsylvania ordered Affectionate Home Health Care Services, LLC and its owners to pay \$1,176,883 in back wages and equal amount in liquidated damages.
 - ◆ Failed to pay overtime premium for hours worked over 40 in a workweek.



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The Current Enforcement Environment


- ◆ January 19, 2023, DOL obtained a consent judgment against Baywood Homecare for \$1,600,000.
 - ◆ Failed to pay in home workers overtime premium.
- ◆ January 9, 2023, Federal Court in Pennsylvania ordered Lucky’s Home Care and its owner Cheryl McMiller, to pay \$142,634 in back wages and an equal amount in liquidated damages.
 - ◆ Issue: capped overtime. Once employees exceeded the cap, went back to straight time for hours worked.
 - ◆ Agency was also assessed a \$21,528.00 civil penalty.
- ◆ Many more like these.
- ◆ Examples of other DOL Areas of Focus with Homecare.



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The Current Enforcement Environment


- ◆ During FY 2021, a Home Health Agency ordered to pay \$432,000 in back wages and damages. EEOC sued company.
 - ◆ 171 Employees impacted.
 - ◆ \$215,859 in unpaid wages.
 - ◆ \$216,938 in liquidated damages.
- ◆ Issue in case: **related companies failed to properly aggregate hours for jointly employed individuals.**
- ◆ Employees who worked for both agencies were entitled to overtime when they went over 40 hours combined for both companies.
- ◆ **WHEN EMPLOYEES WORK FOR RELATED COMPANIES, YOU NEED TO CONSIDER JOINT EMPLOYMENT.**



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The Current Enforcement Environment


- ◆ DOL sued a home health agency for **misclassifying** employees as independent contractors.
 - ◆ Successful Aging Care Net, (PA): Ordered to paying \$4.4 Million in back wages and liquidated damages for failing to pay overtime. DOL alleged employer had misclassified home health aides and other employees as independent contractors.
- ◆ DOL has a website dedicated to misclassification. <https://www.dol.gov/agencies/whd/flsa/misclassification>
- ◆ This is a significant area of DOL focus.
- ◆ Need to understand the how to classify workers.



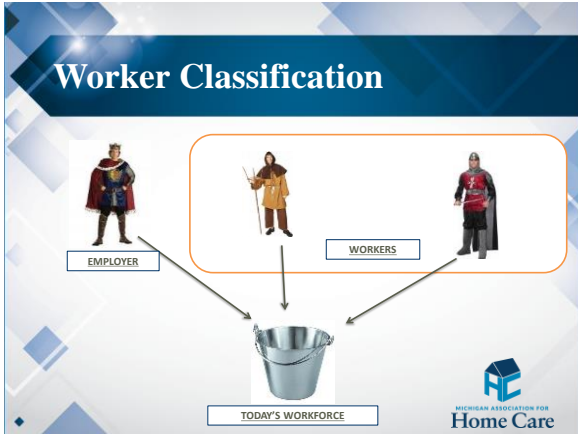
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The Current Enforcement Environment

- ◆ On November 16, 2022, as part of recognizing “National Home Care and Hospice Month,” DOL announced an initiative that has been ongoing for at least a year.
- ◆ This initiative is focused on CNAs, Home Health aides and personal care workers.
- ◆ At the time of the announcement, this initiative had completed more than 1600 investigations.
- ◆ **THE DOL FOUND VIOLATIONS IN 80% OF ITS REVIEWS.**
- ◆ Most common violations: failure to pay overtime and **employee misclassification.**



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Worker Classification

- ◆ The Employer is obvious—they issue the paychecks.
- ◆ How to classify the workers is not as obvious.
- ◆ Workers can be placed into two categories:

The diagram shows two categories of workers. On the left, a figure is labeled 'EMPLOYEES'. On the right, a figure is labeled 'INDEPENDENT CONTRACTORS'. The Michigan Association for Home Care logo is in the bottom right corner.

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Worker Classification


- ◆ Worker classification is an important issue under the Fair Labor Standards Act and many other federal laws.
 - ◆ EEOC
 - ◆ FMLA
 - ◆ ACA
- ◆ Employees and independent contractors are treated differently under state and federal law.
- ◆ Misclassification can lead to wage and hour issues, tax issues and other non-compliance.

The Michigan Association for Home Care logo is in the bottom right corner.

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Current Enforcement


- ◆ Current administration views most workers as employees, not independent contractors. Need to understand this when thinking about employee classification.
- ◆ DOL has also renewed its focus on homecare.



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Worker Classification


- ◆ DOL recently sued a home health agency for misclassifying employees as independent contractors.
 - ◆ Successful Aging Care Net, Inc. (PA): Ordered to paying \$4.4 Million in back wages and liquidated damages for failing to pay overtime. DOL alleged employer had misclassified home health aides and other employees as independent contractors.
- ◆ DOL has a website dedicated to misclassification. <https://www.dol.gov/agencies/whd/flsa/misclassification>



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DOL Initiative


- ◆ November 16, 2022, DOL announced an initiative that has been ongoing for at least a year.
- ◆ This initiative is focused on CNAs, Home Health aides and personal care workers.
- ◆ This initiative has completed more than 1600 investigations.
- ◆ **THE DOL FOUND VIOLATIONS IN 80% OF ITS REVIEWS.**
- ◆ Most common violations: failure to pay overtime and employee misclassification.
- ◆ Misclassification has been, and will continue to be, an area of DOL focus.



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Worker Classification


- ◆ The classification of workers as employees or independent contractors is governed by:
 - ◆ Federal Court Case Law
 - ◆ DOL Regulations
- ◆ The DOL regulations have undergone several changes over the past few years.



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DOL Regulations


- ◆ Trump Administration published a rule regarding employee classification. Biden administration withdrew the rule.
- ◆ On March 14, 2022, a federal court ruled that the Biden administration had failed to provide a sufficient comment period. This meant the withdrawal of the rule was illegal.
- ◆ Trump Administration DOL had a narrower view of employee.



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DOL Regulations

- ◆ Worker classification test. 29 C.F.R. Part 795
- ◆ Evaluate the “economic reality” of the relationship using these factors:
 - ◆ Nature and degree of control over the work (core factor).
 - ◆ Worker’s opportunity for profit or loss (core factor).
 - ◆ Amount of skill required for work.
 - ◆ Degree of permanence of the working relationship.
 - ◆ Whether work is part of an integrated unit of production.
 - ◆ Additional factors may be relevant.
- ◆ All factors evaluated; Core Factors most important.
- ◆ Very similar to test developed by federal courts.



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DOL Regulations

- ◆ This is still the current regulation that is in effect.
- ◆ It was intended to simplify assessment. Used core factors for this purpose.
- ◆ Current DOL leadership objects to the “core factors.”
- ◆ All factors in regulation reflect factors utilized by the courts.



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Federal Courts

- ◆ The U.S. Supreme Court has repeatedly stated that court should construed the FLSA “liberally to apply *to the furthest reaches* consistent with congressional direction,” *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211, 79 S. Ct. 260, 264, 3 L.Ed.2d 243 (1959) (emphasis added).
- ◆ Such broad coverage is necessary “to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.” *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 296, 105 S.Ct. 1953, 1959 (1985).



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Federal Courts

- ◆ The courts evaluate the worker’s relationship with the employer to assess the economic realities.
- ◆ “The touchstone of this inquiry is “whether the worker is economically dependent on the business to which he renders service or is ...in business for himself.” *Acosta v. At-Home Personal Care Services, LLC.*, 2019 WL 1601997, *6. (quoting *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 150 (4th Cir. 2017))



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Federal Courts

- ◆ The courts generally evaluate the following factors:
 - ◆ the degree of the alleged employer’s control;
 - ◆ the worker’s opportunity for profit and loss;
 - ◆ the worker’s investment in equipment or materials;
 - ◆ whether the service rendered requires a special skill;
 - ◆ the degree of permanency/duration of the relationship;
 - ◆ the extent to which the service is an integral part of the alleged employer’s business.



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Federal Courts

- ◆ Courts evaluate all six factors to determine economic reality.
- ◆ No single factor is controlling.
- ◆ Courts look at the totality of the circumstances.
- ◆ The multi-factor test allows for a certain amount of flexibility.
- ◆ It goes beyond the traditional common law agency tests.



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DOL Regulations 2.0?

- ◆ On October 13, 2022, DOL published new proposed rule.
- ◆ Under proposed rule, whether a worker is an employee or an independent depends on 6 factors:
 - ◆ Opportunity for profit or loss
 - ◆ Investments by the worker and the employer
 - ◆ Degree of permanence of the working relationship
 - ◆ Nature and Degree of Control
 - ◆ Extent to which work is an integral part of the employer’s business
 - ◆ Skill and Initiative
- ◆ The regulation specifically allows the consideration of additional factors.



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Worker Classification

- ◆ Eliminates concept of “core factors”.
- ◆ DOL received tens of thousands of comments.
- ◆ Rule is not final yet.
- ◆ Core Factors version of rule still in effect, but revised rule will likely effect later this year.



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Worker Classification

- ◆ Current regulation and proposed regulation have key differences. In most homecare situations, DOL comes to same conclusion.
- ◆ Agencies need to consider how these factors apply to their operations.
- ◆ Misclassifying staff can lead to significant compliance issues.



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Facts Control

- ◆ This is important!!!!
- ◆ Calling an




- ◆ Does not make an



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Facts Control


- ◆ The DOL and Courts look at the facts and how they fit into the identified factors.
- ◆ Use of employment agreements, calling a worker an independent contractor, etc., does not determine the outcome.
- ◆ *How the economic realities test applies determines the outcome.*



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Worker Classification


- ◆ Evaluate the “economic reality” of the relationship using both the current regulation “Economic Realities” test and the Federal court test.
- ◆ For homecare, in most cases, the test will come out the same.
- ◆ Most of your staff are employees under test.



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Worker Classification


- ◆ Specific cases:
 - ◆ Medical director
 - ◆ Therapy staffing company
 - ◆ Nurses/Aides/etc.
 - ◆ Family Members



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Worker Classification


- ◆ Medical Director
 - ◆ Control?
 - ◆ Profit or Loss?
 - ◆ Physician investment in equipment/material?
 - ◆ Degree of skill?
 - ◆ Permanence of relationship?
 - ◆ Services part of business?



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Worker Classification


- ◆ Personnel provided by staffing company.
 - ◆ Control?
 - ◆ Profit or Loss?
 - ◆ Physician investment in equipment/material?
 - ◆ Degree of skill?
 - ◆ Permanence of relationship?
 - ◆ Services part of business?



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Worker Classification


- ◆ Nurses/Aides/etc.
 - ◆ Control?
 - ◆ Profit or Loss?
 - ◆ Physician investment in equipment/material?
 - ◆ Degree of skill?
 - ◆ Permanence of relationship?
 - ◆ Services part of business?



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Worker Classification


- ◆ Family members—special issue
- ◆ The issue of family members arises more frequently, because agencies are desperate for staff.
- ◆ Some agencies developing programs to hire and train family members.
- ◆ Benefits:
 - ◆ Patient comfortable with staff
 - ◆ Worker is available
 - ◆ Provides additional income into the home



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Worker Classification


- ◆ Family members of patient hired to provide care.
 - ◆ Control?
 - ◆ Profit or Loss?
 - ◆ Physician investment in equipment/material?
 - ◆ Degree of skill?
 - ◆ Permanence of relationship?
 - ◆ Services part of business?



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Family Members


- ◆ Nature and degree of control over the work (core factor)
 - ◆ NOA? Service Plan? HCBS regulations? Family freedom?
- ◆ Worker's opportunity for profit or loss (core factor)
 - ◆ Payment is based upon reimbursement.
- ◆ Amount of skill required for work.
 - ◆ Mostly providing care they would provide for free.
- ◆ Degree of permanence of the working relationship.
- ◆ Whether work is part of an integrated unit of production.



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Family Members


- ◆ Real issue—what is the economic reality?
- ◆ Family members often want to be independent contractors.
- ◆ Economic reality—they would be providing the care either way. Many live in the same home as the patient.
- ◆ DOL appears to have concluded these family members are employees.
- ◆ At least one very recent federal case has reached the same conclusion.



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Family Members


- ◆ Need to be very cautious here.
- ◆ Best practice—classify family members as employees.
- ◆ Family may go to a more “flexible” provider, but this is an area of intense DOL focus.
- ◆ Misclassifying family members can result in significant penalties with DOL.



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IRS Notice 2014-7


- ◆ IRS Notice 2014-7, published on January 3, 2014 states:
 - ◆ “that certain payments received by an individual care provider under a state Medicaid Home and Community-Based Services Waiver (Medicaid waiver) program, described in this notice, are difficulty of care payments excludable under §131 of the Internal Revenue Code.”



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IRS Notice 2014-7


- ◆ Some homecare providers have mistakenly understood this notice to mean that their waiver staff who are related to the patient they serve are not employees.
- ◆ That is not the case.



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IRS Notice 2014-7


- ◆ This is an IRS notice regarding what is included within gross income for tax purposes.
- ◆ It is not announcing that individuals who provide waiver services are independent contractors.
- ◆ Even if it identifies contractors, it would only be for tax purposes, not Wage and Hour.



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Other Issues


- ◆ Core services
- ◆ Home Health
- ◆ AKS and marketers



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Other Issues

- ◆ Employee v. Independent contractor can be an issue in for Medicare compliance.
- ◆ The home health and hospice CoPs both include requirements related to use of contracted staff.




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Other Issues

- ◆ An HHA must provide at least *one of the services described in this subsection directly*, but may provide the second service and additional services under arrangement with another agency or organization.


• 42 CFR 484.105(f)



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Other Issues


- ◆ “The HHA must provide skilled nursing services and at least one other therapeutic service. However, only one service has to be provided directly by the HHA.”
- ◆ An HHA is considered to provide a service “directly” when the persons providing the service for the HHA are HHA employees.”
- ◆ An individual is “considered an HHA employee if the HHA is required to issue a form W-2 on the individual’s behalf with no intermediaries”
State Operations Manual, Appendix B.



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Other Issues


- ◆ This means that an HHA has to provide one of the following: skilled nursing, physical therapy, speech-language pathology, or occupational therapy; medical social services; or home health aide services using W-2 employees.
- ◆ This comes up when using PEOs or other efforts to staff out personnel.



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Other Issues


- ◆ “A hospice must routinely provide substantially all core services directly by hospice employees. ... These services include nursing services, medical social services, and counseling. ... A hospice may use contracted staff, if necessary, to supplement hospice employees in order to meet the needs of patients *under extraordinary or other non-routine circumstances.*”
418 C.F.R. 418.64



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Other Issues


- ◆ Employee means a person who: (1) ...for whom the hospice is required to issue a W-2 form on his or her behalf; (2) if the hospice is a subdivision of an agency or organization, an employee of the agency or organization who is assigned to the hospice; or (3) a volunteer.
- ◆ If a contracting service or agency pays the individual, and is required to issue a form W-2 on the individual's behalf ... the individual is not considered a hospice employee. Extraordinary circumstances generally would be a short-term temporary event that was unanticipated.
State Operations Manual, Appendix M



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Other Issues


- ◆ The Hospice Core Services requirement is more stringent than the home health requirement.
- ◆ The exception that allows contractors “extraordinary circumstances” is narrow.
- ◆ It makes it harder to utilize contractors.



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Other Issues—AKS


- ◆ Categorizing workers can have an impact on AKS compliance.
- ◆ There is a statutory safe harbor for “any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.” 42 U.S.C. 1320a-7b(b)(3)(B)



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Other Issues—AKS

- ◆ If the worker is an independent contractor and not an employee, then the safe harbor doesn’t apply.
- ◆ This can be important for marketing and commissions. Contractors cannot be paid a commission.
- ◆ Employees can be paid commissions, because of the bona fide employee safe harbor.



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