

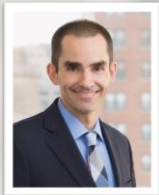
# Homecare Employment

A few important Considerations

Presentation by: Robert W. Markette, Jr., CHC HCS-C

1

## Presented By:



Robert W. Markette, Jr. CHC, HCS-C  
Attorney, Hall Render  
[rmarkette@hallrender.com](mailto:rmarkette@hallrender.com)  
(317) 977-1454

**Robert W. Markette Jr., JD, CHC, HCS-C**, is an attorney with Hall, Render, Killian, Heath & Lyman PC. For over 20 years, he has focused his practice on representing home health, hospice, private duty, and DME providers in all aspects of their operations. Markette works with his clients on issues related to Medicare/Medicaid compliance; payer issues; HIPAA compliance; Medicare and Medicaid fraud and abuse; purchasing and selling home health, hospice, and private duty agencies; and employment matters.

2

2

# Disclaimer

- The following materials and presentation are for educational purposes only. Neither the contents of these materials nor the content of the presentation, including any answers provided by the speaker, are not intended to be and should not be considered to be legal advice.
- Any opinions offered by the speaker are the opinions of the speaker alone. They are not and should not be taken as the opinions of Hall Render or the Indiana Association for Home and Hospice Care

3

HALL RENDER | Learn more at [hallrender.com](http://hallrender.com).

3

HALL RENDER | HEALTH LAW IS OUR BUSINESS

# Agenda



- Employee Drug Testing
- Exempt v. nonexempt
- Bonuses v. Gifts
- Employee eligibility to work
- Worker classification
- Inquiries about former employees
- Employee background checks

4

4

# Exempt v. Nonexempt

- Exempt employees are exempt from minimum wage, overtime or both.
- Nonexempt employees are entitled to both minimum wage and overtime.
- To be exempt, an employee must meet the requirements for the exemption.
- Burden on employer to prove exemption.

5

5

# Exempt v. Nonexempt

- Most common exemptions in homecare are the white collar exemptions.
- To qualify for one of these exemptions the employee must meet both the job duties test **and** the salary basis of payment test.
- Failing to meet either requirement means the employee is not exempt.

6

6

# Salary Basis of Payment

- An employee is paid on a salary basis if the employee “regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 C.F.R. §541.602.

7

7

# Salary Basis of Payment

- Salary must meet a minimum threshold:
  - July 1, 2024 – June 30, 2025: \$844/week
  - July 1, 2025 – June 30, 2027: \$1128/week
  - July 1, 2027 and after – amount calculated according to rule.
- Rule establishing this threshold may be ruled illegal, but for now it is in effect for everyone but the state of Texas (as an employer).

8

8

# Salary Basis of Payment

- Issues with salary:
  - Deductions. May deduct for full day absences for Personal reasons; Sickness or disability according to a plan, policy or practice; Jury, witness or military leave; Major safety infractions; Unpaid disciplinary suspensions pursuant to a written policy; Initial and terminal weeks; and, Unpaid FMLA leave;
  - Bonuses. May pay bonuses but:
    - Bonus + Guaranteed salary may not exceed 1.5 times guaranteed salary.
    - Employee spending more time on non-exempt role than exempt roles.

9

9

# Job Duties Tests

- White Collar Exemptions each of have a job duties test.
- Three exemptions:
  - Learned Professional
  - Executive
  - Administrative
- Need to consider employee position in light of job duties test.

10

10

# “Professional” Duties

- “Primary Duty” must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- Advanced knowledge must be in a field of science or learning; and
- Advanced knowledge must be customarily acquired **by a prolonged course** of specialized intellectual instruction.

11

# “Professional” Duties

- **Field of Science or Learning:** Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

12

## “Professional” Duties

Personal Services Agencies not likely to rely on this exemption.

Usually applies to RNs, PTs, OTs, physicians, etc.

Does not apply to aides and attendants.

13

## “Executive” Duties

- “Primary Duty” is to customarily and regularly manage the business or a department or subdivision.
- **Customarily and regularly directs the work of 2 or more FTEs.**
- Authority to hire or fire.
- Suggestions and recommendations are given particular weight.
- Some courts have recognized this as applying to sales managers.

14

## “Administrative” Duties

- “Primary Duty” is office or non-manual work directly related to management, or the business operations of the employer or its customers.
- Primary duty must include the exercise of discretion and independent judgment as to matters of significance.

15

## Examples of “Administrative” Duties

- Formulate, affect or interpret management policies.
- Major operational assignments.
- Waive or deviate from policies and procedures.
- Negotiate for and bind the employer.
- Provide expert advice to management.
- Plan for business objectives.
- Investigate and resolve significant matters.
- Represent the employer in handling complaints.

16



# Exempt v. Nonexempt

- IMPORTANT: **PAYING AN EMPLOYEE A SALARY ALONE DOES NOT MAKE THEM EXEMPT.**
- An employee who is paid a salary, but who does not meet the job duties test will still be non-exempt and entitled to overtime.

17

17

# Exempt v. Nonexempt

- Important considerations:
  - Review employee job description and compare to job duties tests.
  - Verify pay meets salary basis of payment tests
  - Avoid deductions from salary
  - Have a safe harbor policy. Allow employee to report improper deductions so that you can fix it and maintain the salary basis of payment.

18

18

# Employee Bonus Programs

- Employers often provide bonuses to staff:
  - Christmas bonuses
  - Commissions
  - Longevity
  - Sign-on
  - Productivity
  - and more.
- When providing bonuses need to consider:
  - Impact on payroll – overtime
  - Fraud and Abuse compliance
  - Potential unintended consequences

19

19

# Employee Bonus Programs

- Bonus v. Gift
  - A bonus impacts overtime (for non-exempt employees); a gift does not.
  - What is the difference between a bonus and a gift?
    - A gift is not earned.
    - If the employee is entitled to receive an amount it is not a gift: Contractual right to bonus that is enforceable in court; Required by Statute; Required by ordinance; Required by collective bargaining agreement.
- Performance bonuses and commissions are earned. When the

20

20

# Employee Bonus Programs

- Bonus v. Gift
  - When a bonus is earned, it must be included in the regular rate.
  - For non-exempt employees, bonuses earned over multiple pay periods must be apportioned back over the pay periods over which the bonus was earned. The bonus can change the amount of overtime.
  - Example: Employee earns an \$800 bonus over a 4 week period. One fourth of the total bonus (\$200) would be added to the regular rate for each week in the four-week period. In week 3, the employee worked 50 hours. Bonus increases regular rate by  $\$200/50 = \$4/\text{hour}$ . Employee entitled to  $0.5 * \$4 * 10 \text{ hours} = \$20$  of overtime pay.

21

21

# Employee Bonus Programs

- Commissions.
- Commissions are earned bonuses and impact overtime for non-exempt employees like any other bonus.
- In home health, hospice and private duty, commissions are generally paid for generating new Medicare, Medicaid or Medicaid Waiver business.
- This implicates the Anti-Kickback Statute, which prohibits offering, soliciting, providing, or accepting any remuneration as an inducement to or reward for referring federally reimbursable business.

22

22

# Employee Bonus Programs

- Commissions
- There is a safe harbor for bonafide employees. It states: ““remuneration” does not include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.” 42 CFR 1001.952(i)
- This provides a safe harbor for employees.
- Recent OIG opinion from OIG approved a bonus payment to physicians for fees generated by services the physician’s performed. OIG relied upon this safe harbor.

23

23

# Employee Bonus Programs

- Performance bonuses create a financial incentive for employee conduct.
- YOU WILL GET WHAT YOU PAY FOR!!!
- Think through unintended consequences.
- When creating commissions policy, include compliance oversight and clear guardrails.

24

24

# Verifying Employee Eligibility

- Employers must complete the I-9. Both the employer and employee have sections.
- Within three business days after the employee's first date of employment the employee "must present to [the employer] original, acceptable, and unexpired documentation" to establish the employees identity and employment authorization.
- Notice: you must see original copies.

25

25

# Verifying Employee Eligibility

- Some employers have instituted web-based systems.
- It is permissible to use a web-based form system.
- However, **it is not permissible** to view the documents that establish identity and eligibility to work remotely.
- You must see the originals.
- The I-9 Instructions tell the employee, "Your employer **must physically examine** the documentation you present to complete Form I-9."

26

26

## Verifying Employee Eligibility

- I-9 requires the employer to sign the following certification:
  - Certification: I attest, under penalty of perjury, that (1) *I have examined the documentation presented by the above-named employee*, (2) the above-listed documentation appears to be genuine and to relate to the employee named, and (3) to the best of my knowledge, the employee is authorized to work in the United States
- The employer attests that they reviewed the documents.

27

27

## Worker Classification

- This has been a “hot topic” for several years.
- DOL continues to focus on employers misclassifying staff.
- Multiple investigations in Indiana looking at classification.
- Many homecare employers have overlooked this issue.

28

28

# Worker Classification

- On January 10, 2024, DOL published its final rule on Worker Classification
- “Employee or Independent Contractor Classification Under the Fair Labor Standards Act”
- DOL calls it the Independent Contractor Rule.
- Replaces the rule promulgated by DOL under Trump Administration.

29

29

# Worker Classification

- Final Rule Adopts following factors to assess “Economic Reality”
  - Opportunity for profit or loss depending upon managerial skill.
  - Investments by the worker and the employer
  - Degree of permanence of the working relationship
  - Nature and degree of control
  - Extent to which the work an integral part of the employer’s business
  - Skill and Initiative
  - Additional factors.

30

30

# Worker Classification

- Rule utilizes similar factors to the federal courts
- When evaluating the economic realities, federal courts have, for decades, generally looked at these factors:
  1. the nature and degree of the alleged employer's control;
  2. the worker's opportunity for profit or loss;
  3. the worker's investment in equipment or materials;
  4. whether the service rendered requires a special skill;
  5. the degree of permanency and duration of the relationship;
  6. the extent to which the service is an integral part of the alleged employer's business.

31

31

# Worker Classification

- Key issue: current administration's interpretation of regulations and view of employment.
- DOL takes a **very broad view** of who is an employee. They default to assuming workers are employees.
- Burden is on employer to show otherwise.
- This administration views individuals who are paid by Medicaid Waiver to provide care to family members in their own homes as employees.
- Need to carefully consider, and seek legal advice, whenever you think you have an independent contractor.

32

32



# Inquiries About Former Employees

- Employers routinely receive calls about former employees from the former employees' potential new employer.
- Employers are often uncertain what to say. Concern that former employee may take action if they say anything negative.
- Issues: blacklisting, slander, tortious interference with business relationships...

33

33

# Inquiries About Former Employees

- Truth is a defense to these claims. An employer who simply tells the truth about a former employee will have a later defense.
- Many employers stick to the following true statements:
  - Date of hire
  - Date of separation
  - Eligibility for rehire (not as frequently)
- Hard to be accused of slander when employer simply confirms individual worked for provider during specific period.

34

34



## Inquiries About Former Employees

- Employers can go beyond that, but need to be prepared to prove statements that were made.
- When an employer wants to communicate to not hire a candidate, stating that they are not eligible for rehire can provide some warning.
  - Do you have a clear policy defining when someone is not eligible for rehire? Were they told that at the time of separation?

35

35



## Employee Background Checks

- Criminal background checks are a routine component of hiring in homecare.
- Kentucky requires home health providers to perform criminal background checks on staff.
- Medicare requires hospice to perform criminal background checks on all employees who have direct patient contact or access to patient records. 42 CFR 418.114(d)
- Providers who accept Medicare, Medicaid, or Medicaid Waiver need to perform exclusion list checks.

36

36



# Employee Background Checks

- EEOC has also expressed concerns that background check policies have a disparate impact on minorities.
- Need to have a written policy that:
  - Explains business need for background checks
    - Statutory/Regulatory requirements
    - Patient safety
  - Lists disqualifying offenses.
    - Consider more than just statutory/regulatory offenses?
- Follow policy as written.

37

37



# Employee Background Checks

- Convictions only. This is important. Do not disqualify based upon arrests.
  - Individuals are innocent until proven guilty.
  - EEOC especially concerned about the disparate impact of arrests.
- If you desire to disqualify based upon conduct underlying an arrest that did not lead to conviction, you must perform your own investigation.
  - Be prepared to explain what you found and why you disqualified the individual despite the lack of conviction.

38

38

# Employee Background Checks

- Failing to follow background check policy will lead to claims of discrimination.
- You cannot make exceptions, unless....
- Policy spells out exceptions
  - What offenses are subject to exceptions.
  - Criteria for exceptions:
    - Time since conviction
    - No additional convictions
    - Other?
- Address exceptions in policy. Follow as written.

39

39

# Employee Drug Testing

- Over the past few years, Illinois, Michigan and Ohio have all legalized recreational Marijuana.
- Kentucky legalized “Medical Marijuana” (effective 1/1/2025)
- Indiana legalized Low THC Extract – CBD.

40

40

# Employee Drug Testing

- The legalization of recreational marijuana across the country has caused employers to question the usefulness of drug testing.
- When an employee test positive for Marijuana, they just say, “I went to [Illinois/Ohio] this weekend” or “I take CBD.”
- Starting January 1, 2024 – “I have a prescription.”
- These changes have resulted in an increase in employees testing positive for marijuana.

41

41

# Employee Drug Testing

- Marijuana is, for now, still a Schedule I Controlled Substance.
- On May 21, 2024, the DEA published a proposed rule to reschedule Marijuana as a Schedule III controlled substance.
- Would still be a controlled substance, just different schedule.
- Still subject to schedule III requirements – prescription, etc.
- This would not make recreational marijuana use legal.
- Simply another step towards legalization.

42

42

# Employee Drug Testing

- Given all of these changes, is drug testing still worthwhile?
- Considerations:
  - Even if Marijuana is legalized using marijuana while at work would still be grounds for discipline.
  - Drug test tests for other drugs. Employers usually utilize a 5 or 10 panel screen.
  - Ability to test upon suspicion or when there is an accident can be useful tools in investigations.

43

43

# Employee Drug Testing

- Testing requires a policy.
- Policy should clearly state:
  - Who is subjected to testing.
  - When/Why are they subjected to testing.
  - How testing is handled.
  - What drugs are being test for?
  - How positive test results are handled.
  - Penalties for positive test results.

44

44

# Agency Procedures

- Who is tested:
  - All employees?
  - Field staff only?
  - Other subset?
  - Rational basis for selecting a subset of employee population?
    - Field staff due to patient contact/presence in home where drugs are kept

45

45

# Agency Procedures

- When/Why are individuals tested?
  - At time of hire? Post offer, pre-employment.
  - Randomly?
  - Accidents/Adverse Events?
    - Fleet cars? Leasing company may require.
    - OSHA – drug testing cannot be used as a form of discipline
  - Reasonable suspicion?
    - Employee appears *under the influence* at work?
- Providers should consider having all options in policy.

46

46



# Drug Testing – the Mechanics

- Initial Screening Test:
  - Uses a quantitative, not qualitative approach.
  - Designed to avoid use of more expensive testing on most samples.
  - Designed to be faster. (Not as accurate.)
  - Negative here is a negative.
  - Positive could be a false positive.
  - Initial screening for marijuana tests for all 31 metabolite concentration of THC.
  - This could result in a positive test for THC if employee is taking CBD Oil that has THC. No way to know source.

47

47



# Drug Testing – the Mechanics

- Second Confirmatory Test
  - Generally performed on all initial positive tests.
  - Uses a more accurate/costly technique: gas chromatograph/mass spectrometer.
  - Testing for specific substance to confirm initial test.
  - This test can not only identify what is in the sample, but concentrations.
  - This test may come back negative after the initial test.
  - If this test comes back positive, it is a positive result.
  - Again – cannot tell if THC is from CBD or Marijuana

48

48



# Agency Procedures

- How testing handled:
  - Employee notification.
  - Timeframe to be tested? Within 24 hours of notice? (Usually 24-72 hour window).
    - Too much warning: employee can flush system.
  - Where to go for test.
  - For what substances will sample be tested?
    - When contracting with drug testing company, you will need to select the “panel” for which you will screen employees.
    - There are 5 panel tests and 10 panel tests

49

49

# Agency Procedures

- Result of Positive test:
  - Can employee produce a prescription?
    - If so, that is the end of inquiry.
    - Be careful of ADA – you now know something about employee “disability.”
  - Initial positive will require a confirmatory test.
  - Confirmation test may be automatic depending upon vendor.
  - Employee rights to appeal/re-test sample.
    - Need to have enough of a sample for re-test.
- Penalty for positive test:
  - Policy should spell out penalty for a positive test.
- Document basis for test, test results, ensuing action. May be sued for discrimination later.

50

50

# Agency Procedures

- It is important to **follow the procedure as written**.
- Ad hoc changes or exceptions can create issues later.
  - Employees may claim discriminatory testing selection.
  - Employees may claim discriminatory penalties.
- Better to not test at all than to not follow the procedure exactly as written.

51

51

# Agency Procedures – Additional Considerations

- Should marijuana prohibition still be a part of your policy?
  - Still illegal in Indiana, but border states.
  - ***Explicitly include marijuana if you intend to include it.***
- Consider defining “impairment.”
  - What it means to be “under the influence”
  - Avoid/eliminate subjectivity
- Consider defining reasonable suspicion

52

# Disability Issues

- Remember your obligations under the ADA.
- What questions can I ask the applicant who disclosed marijuana/CBD use during the application or interview process?
  - With an applicant who does not have a job offer, employers cannot make disability related inquiries and should not drug test or require medical examinations prior to conditional job offers.
- What questions can I ask the applicant who tested positive?
- What about the employee who tested positive?
  - Employers can make disability related inquiries if they're job related and consistent with business necessity.

53

# Drug Testing and Union Contracts

- NLRB: Drug testing is a mandatory subject of bargaining and must be addressed in Union contract (unless waived).
  - No unilateral implementation of changes in drug testing policy for employers with union employees.
- Union contracts = more specificity.
- Presence of union representative?

54



## Privacy of Drug Testing Results

- Keep results in a confidential record.
  - HIPAA does not apply to the drug test results except to the extent the employee is otherwise a patient.
  - If you are a HIPAA covered entity, make sure drug testing form authorizes release of results to employer.
- Not part of the personnel file, keep in separate file to protect the employee.
- Test results should only be disclosed to individuals who really need to know.

55



## Positive Test and ADA

- Employee tests positive for marijuana, but claims Marijuana use is for disability? Is this a reasonable accommodation?
- A number of lawsuits alleging discrimination under the ADA related to the employee's use of marijuana have arisen in states that have legalized marijuana.
- Every federal court that has looked at this has concluded firing an employee for marijuana use qualifies as firing an employee for illegal drug use.
- This is because federal law still considers marijuana illegal.

56

56

# Positive Test and CBD Oil

- These cases, prior to the Farm Bill, made CBD Oil not a reasonable accommodation.
- Now? Not illegal, but FDA still states it must approve?
- Most CBD Oil products not FDA approved.
- Issue: Was it really CBD Oil? The test is a positive test for THC. Was the THC from Marijuana or CBD Oil?
  - Employee would likely have to have consumed a large amount of CBD Oil.

57

57

HEALTH LAW  
IS OUR BUSINESS.

HALL  
RENDER  
KILLIAN HEATH & LYMAN

For more information on these topics  
visit [hallrender.com](http://hallrender.com).



Robert W. Markette, Jr., CHC  
[rmarkette@hallrender.com](mailto:rmarkette@hallrender.com)

*This presentation is solely for educational purposes and the matters presented herein do not constitute legal advice with respect to your particular situation.*

58

58