

“Pay Per Visit” and the Litigation Risk for Home Health Care Organizations

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Many home health care organizations pay, or have considered paying, exempt nurses, occupational therapists, physical therapists, medical social workers, speech therapists/pathologists, and other exempt home health workers on a predetermined “Pay Per-Visit” (PPV)

basis, rather than on a salary or hourly basis. While the Fair Labor Standards Act (FLSA), the U.S. Department of Labor (DOL) regulations, and many states’ wage and hour laws permit payment on a fee basis under certain circumstances, the hurdles to satisfy the fee basis requirements are high, and if not fully satisfied, can create substantial litigation risk.

FLSA lawsuits, which often are asserted on a class or collective action basis, have surged in the past decade. According to the Public Access to Court Electronic Records, in 2014 alone, plaintiffs filed 8,087 FLSA lawsuits in federal court and, in the first quarter of 2015, that number already exceeds 2,000. One example of a pay practice that has come under scrutiny is the PPV model, as home health care workers have challenged whether it complies with the FLSA and state wage and hour laws. If a PPV model is found to



not comply with federal and state wage and hour laws, the employer could be on the hook for millions of dollars in liability.

PPV—What Is It?

The FLSA provides for “fee basis” payment arrangements where an employee, otherwise exempt under the “duties test” as a learned professional, administrative employee, or certain computer-related occupations, is paid “an agreed sum for a single job regardless of the time required for its completion.”¹ The work performed by the employee must be “unique” to fall within the ambit of the exemption: “generally a ‘fee’ is paid for the kind of job that is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again.”² Additionally, to constitute fee basis compensation, payments must be based on the accomplishment of a given task and not on the number of hours or days worked.³

While federal regulations require that a fee basis payment cannot be a proxy for time, the fee basis payment must meet the minimum amount of salary required for exemption under federal regulations (i.e., \$455 per week).⁴ To make this determination, “the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours.”⁵

Payment on a PPV basis understandably is appealing, as it provides home health care organizations with the ability to more closely control costs. Whether the compensation is paid for a unique job in the home health care industry as well as the manner of payment to PPV employees have both been the subject of recent litigation.

For example, in Connecticut, a class of employees is suing Amedisys Inc., a national home health care provider, alleging they were paid improperly under the FLSA and state law.⁶ According to the complaint, Amedisys’ compensation model includes PPV flat fee payments for some work and hourly payments for other work.⁷ Amedisys compensates nurses, physical therapists, occupational therapists, and speech pathologists based on a specific visit rate depending on the type of visit.⁸ For example, routine, start-of-care, and recertification visits all are paid at different rates.⁹ The complaint also alleges that Amedisys assigns a certain number of points to each type of patient visit that reflect time estimates for the respective visit. According to the complaint, Amedisys also pays the referenced employees an hourly rate for other “administrative” work that includes time spent in conferences, staff meetings, training, and recertifications.¹⁰ The district court has conditionally certified a collective action to pursue the plaintiffs’ FLSA overtime claims under 29 U.S.C. § 216(b).

Legal Challenges to PPV Compensation Models

“Uniqueness”

While DOL regulations provide broad principles as to what is required to satisfy the fee basis test, there is precious little case law on whether home care services are unique. Although the only two district court decisions to meaningfully examine this issue reach opposite conclusions, the Sixth Circuit affirmed the district court’s holding in *Fazekas v. The Cleveland Clinic Health Care Ventures, Inc.*, a class action filed by Registered Nurses (RNs) of a home health care provider, which concluded that such services are unique under the FLSA.

In *Fazekas*, the district court considered “whether the compensation structure under which plaintiffs, registered nurses, provided nursing services for defendant constitute[d] a ‘fee basis’ form of compensation under regulations promulgated by the [DOL].”¹¹ The RNs argued they were entitled to overtime compensation because their work was not unique, citing to DOL guidance, and accordingly, they were not being paid properly under the FLSA. Relying primarily on a 1992 DOL opinion letter, the district court ultimately concluded that the RNs’ work was unique, because they “were responsible for applying their professional skills and judgment to each unique patient situation.”¹²

Approximately one year later, a different judge from the same district court reached the opposite conclusion. In *Elwell v. Univ. Hosp. Home Health Care Services*, the plaintiff was a home health care RN who was paid on a PPV basis for home visits and at an hourly rate for on-call duty and attendance at mandatory meetings.¹³ While much of the dispute concerned the hybrid nature of the payment structure (discussed below), the court concluded, relying on a 1998 DOL opinion letter, that the RN’s “services were not unique” “because unlike work performed by a singer, artist, or illustrator, the work performed by the nurse is generally repetitive and not original in character.”¹⁴

Three months later, the Sixth Circuit decided the RNs’ appeal in the *Fazekas* case, and agreed that the RNs’ work was “unique,”¹⁵ explaining that:

the work performed during each home health care visit, given the number of different circumstances unique to each patient’s treatment plan as that patient progresses, is closer to the work performed by a singer, who may, after all, perform the same song or set of songs over and over again during a series of performances, or that of an illustrator, who may similarly repeat the same drawings or set of drawings as necessary, than it is to the payments for “piecework” described in the regulations as payments not on a ‘fee basis.’¹⁶

Although *Elwell* subsequently reached the Sixth Circuit on cross-appeals, the plaintiff abandoned her argument that her work was not unique.¹⁷ As a result, the Sixth Circuit was not required to harmonize the *Fazekas* opinions with the finding of the *Elwell* district court. Nevertheless, the Sixth Circuit in *Fazekas* rejected reasoning nearly identical to that of the district court in *Elwell*; as such, there is a strong argument that *Elwell*'s holding regarding the "uniqueness" of the RN's work has been effectively reversed. No other court or administrative agency has issued an opinion on this subject since the Sixth Circuit's holding in *Fazekas*. As such, the Sixth Circuit is the last and highest word on the question.

"Manner of Payment"

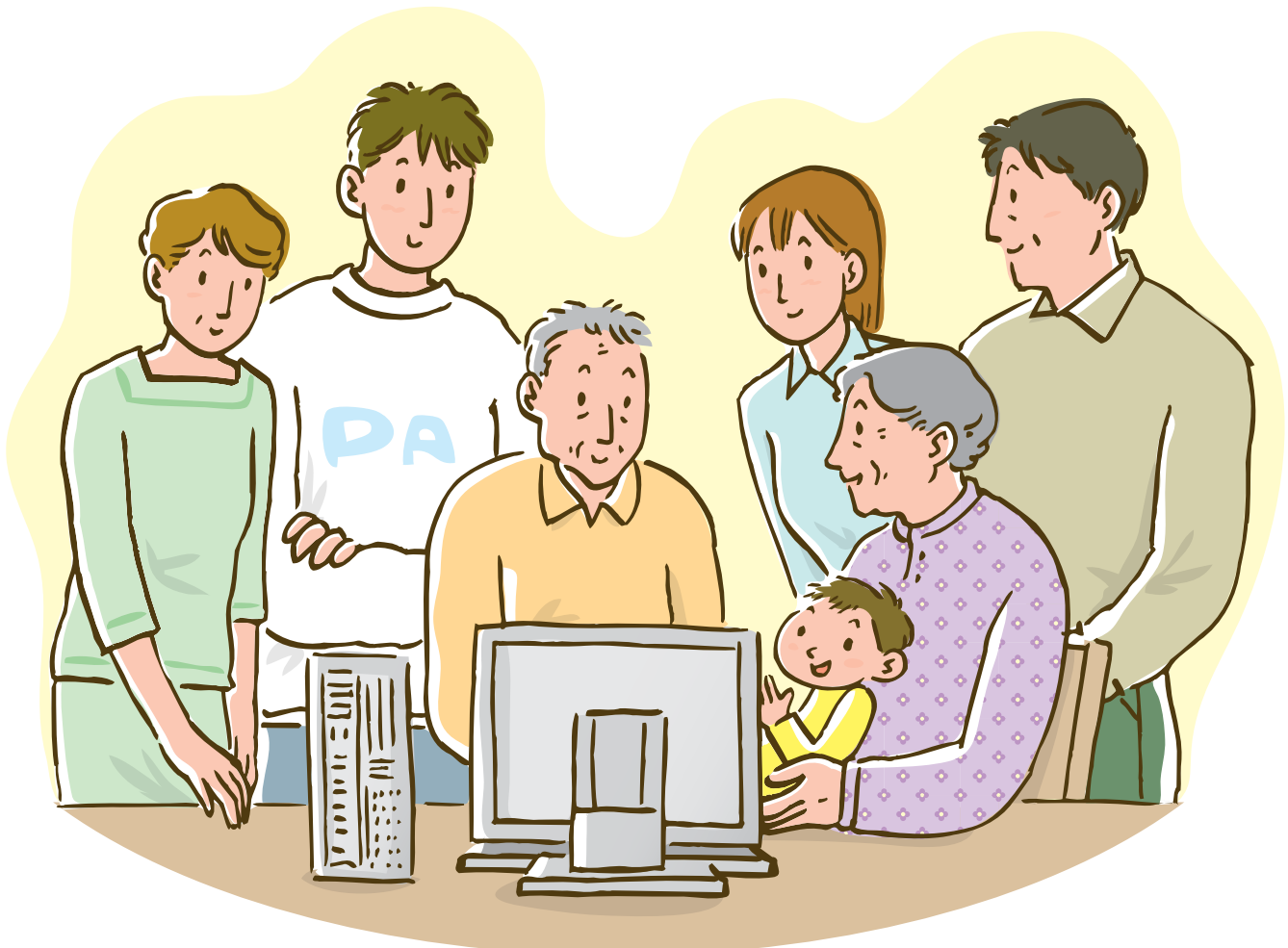
Probably the most contested area of the PPV model is the manner in which PPV compensation is structured, because to constitute fee basis compensation, payments must be based solely on the completion of a particular task.¹⁸ No part of an employee's compensation can be based on the number of hours or days worked.

For example, the *Fazekas* RNs received \$30 for each home visit during periods when they were not "on call," and \$32 per visit when "on call."¹⁹ These payments included compen-

sation for all attendant transportation and administrative duties connected with the actual visits themselves.²⁰ The RNs received no additional compensation beyond the fixed fee per visit, and they were not separately compensated for being on call or for any training time.²¹ The Sixth Circuit ultimately found that given that the RNs were paid solely on a PPV basis, the RNs were appropriately compensated on a fee basis, and were exempt from overtime.²²

Unlike *Fazekas*, the RN in *Elwell* was paid on a PPV basis for home care visits and on an hourly basis for on-call duties, staff meetings, in-service training, and for any time spent during a home visit that exceeded two hours.²³ Due to this "hybrid" compensation model, the district court, in granting summary judgment to the RN, found that the home health care service did not pay the RN an agreed sum "regardless of time spent on a particular task but used time estimates for a flat payment amount with an enhancement by an hourly rate if a visit took over two hours."²⁴

In addition to the prohibition on tying any part of compensation to hours or days worked, the district court in *Elwell* suggested that federal regulations prohibit employers from paying any additional compensation to fee basis employees.²⁵ The district court advised the "extra" compensation Elwell



received for attending meetings and being on call actually was “extra pay for extra work,” in violation of the fee basis regulations.²⁶

On appeal, the Sixth Circuit, affirmed and noted that the language of the regulations “suggests that a compensation plan is not a fee-basis arrangement if it contains *any component that ties compensation to the number of hours worked.*”²⁷ Moreover, the Sixth Circuit observed that “hybrid compensation plans, *which combine both fee basis and hourly compensation,* are excluded from the definition of fee basis arrangements.”²⁸ Therefore, because “Elwell’s compensation arrangement was based at least in part on the number of hours she worked,” the Sixth Circuit concluded that she was not properly paid on a fee basis.²⁹

The Sixth Circuit’s holding in *Elwell* is distinguishable from the holding of *Fazekas* because the *Fazekas* RNs were compensated *solely* on a fee basis and did not receive hourly payments for any of their duties.³⁰

The most recent case opining on the issue of a PPV model in the home health care context is *Rindfleisch v. Gentiva Health Services*, another class action against a home health care provider. In *Rindfleisch*, in addition to receiving a fee per visit, nurses and physical or occupational therapists received a fixed administrative “bonus” fee for certain non-visit activities.³¹ To determine the fee paid for each visit under the PPV model, *Gentiva*:

devised a ‘visit rate’ system based upon a ‘visit unit,’ whereby a visit unit is worth a preset dollar amount, and each patient visit is worth a defined number of units based on the care provided. For ‘non-visit’ work—such as conferences, training time, staff meetings, and orientations—the Clinicians receive[d] a ‘flat rate.’ The flat rate is itself a function of visit units and the amount of time dedicated to the non-visit work.³²

The court granted summary judgment in favor of the class of nurses, finding that because the non-visit fees paid to the plaintiffs varied based on the amount of time it took the nurses and physical or occupational therapists to complete the non-visit activities, the nurses were not paid on a fee basis.³³ The *Rindfleisch* court, like the *Elwell* court, found that the fee basis regulations do not permit extra payments beyond the appropriate fee.³⁴

What Does This Mean for My Home Health Care Workforce?

Given the holdings in *Elwell* and *Rindfleisch* and the plain language of the DOL regulations, it is clear that no part of a PPV employee’s compensation may be tied to hours worked. Employers that provide PPV employees with any additional compensation above the fee paid for each visit may be doing so at their peril. Rather, to the extent that such PPV models

are viewed as compensating employees for performing tasks like training, such a payment scheme might be vulnerable to attack because participation in tasks such as training could be viewed as not unique.

Given this opaque area of law, home health care organizations can take the proactive steps listed below to mitigate litigation risks attendant with a PPV compensation model based on DOL regulations. Home health care organizations always should consult state law to ensure that state law does not provide additional requirements to pay employees on a fee basis.

1. Ensure the set “fee” for each visit under the PPV model is not a proxy for time. The amount paid to each employee per visit should not be based in any manner on the amount of time the employee takes to complete each visit;
2. Avoid any “billable rate” and “unit fee” structuring in a PPV model, to the extent that the rate set is in any way a “proxy for time”;
3. If switching home health care workers to a PPV compensation model, do not provide them any additional compensation above and beyond the set fee for each visit;
4. Avoid any bonus payment system as it might create a hybrid compensation model whereby employees are not paid exclusively on a fee basis;
5. Since payment must be strictly on a fee basis, there can be no compensation for time where no services are performed without creating significant legal risk, which means that vacation, holidays, and paid time off should not be paid to employees who are compensated on a fee basis; and
6. If a home health care organization intends to convert part-time employees to a PPV compensation model, those part-time employees still must be paid in a manner that guarantees them at least \$455 per week (or the salary basis amount that then might be in effect) regardless of the number of hours the employees work.

While the PPV model remains a viable option for home health care organizations seeking to control costs, organizations must remain vigilant in their efforts to comply with the web of regulatory requirements while simultaneously being aware of the developing litigation landscape in this area.

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- 1 29 C.F.R. §§ 541.400(b), 541.605(a).
- 2 *Id.*
- 3 *Id.*
- 4 In March 2014, President Barack Obama issued a memorandum to DOL Secretary Thomas Perez directing him to "propose revisions to modernize and streamline the existing overtime regulations" of the FLSA. While as of the date of this article, no proposed revisions to the FLSA regulations have been published, *The Huffington Post* reported that DOL likely will propose an increase in the minimum salary requirement of at least \$42,000 (or slightly more than \$800 per week).
- 5 29 C.F.R. § 541.605(b).
- 6 *Tomkins v. Amedisys, Inc.*, No. 3:12-cv-1082 (D. Conn.). As of the date of drafting this article, the district court has not issued any opinion regarding the merits of the plaintiffs' case and whether a PPV compensation model is appropriate in the home health care context. Moreover, on March 24, 2015, the district court stayed the case pending mediation among the parties.
- 7 See *Tomkins*, Pl's. Compl. at ¶ 3.
- 8 *Tomkins v. Amedisys, Inc.*, 2014 U.S. Dist. LEXIS 3660, at *2-3 (D. Conn. Jan. 13, 2014).

- 9 *Id.* at *3.
- 10 *Id.* Additional cases have been filed against Amedisys challenging the same pay provisions nationwide; however, those cases have all been stayed pending resolution of the lawsuit pending in Connecticut.
- 11 *Fazekas*, 29 F. Supp. 2d 839 at 840, *aff'd*, 204 F.3d 673 (6th Cir. 2000).
- 12 *Id.* at 844-45.
- 13 *Elwell*, 76 F. Supp. 2d 805 (N.D. Ohio 1999).
- 14 *Id.* at 808.
- 15 *Fazekas v. Cleveland Clinic Found.*, 204 F.3d 673 (6th Cir. 2000).
- 16 *Id.* at 678-79.
- 17 *Elwell v. Univ. Hosp. Home Health Care Servs.*, 276 F.3d 832, 838 (6th Cir. 2002).
- 18 29 C.F.R. § 541.605(a).
- 19 *Fazekas*, 204 F.3d at 675.
- 20 *Id.*
- 21 *Id.*
- 22 *Id.* at 679.
- 23 *Elwell*, 276 F.3d at 835.
- 24 *Id.* at 836 (citation omitted).
- 25 *Elwell*, 76 F. Supp. 2d at 807.
- 26 *Id.*
- 27 *Elwell*, 276 F.3d at 838 (emphasis added).
- 28 *Id.* (emphasis added).
- 29 *Id.*
- 30 *Id.* at 840.
- 31 *Rindfleisch v. Gentiva Health Servs.*, 962 F. Supp. 2d 1310 (N.D. Ga. 2013).
- 32 *Id.* at 1313 (internal citations omitted).
- 33 *Id.* at 1320.
- 34 *Id.*

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