CareForum 2022

The WellSky® Conference

Latest legal developments impacting the home care industry

Angelo Spinola, Esq.

Home Health, Home Care, and Hospice Chair

9/8/2022

CareForum 2022

The WellSky® Conference

Today’s speaker

Angelo Spinola, Esq

Home Health, Home Care, and Hospice Chair

Polsinelli

POLSINELLI

BY THE NUMBERS

950 attorneys nationwide

45+ years of client service

170 services/industries

7 core practice areas

Nationally recognized

for Real Estate, Mid-Market Transactions & Disputes Financial Services, IP, Labor and Employment and Health Care

Best Lawyers BEST LAW FIRMS U.S.News & WORLD REPORT 2022

14 national Tier One rankings

64 regional Tier One rankings

U.S. News and World Report's "Best Law Firms"

67th in Am Law's annual firm rankings.

Am Law 100 Firm
The American Lawyer

Recognized
for **strongest client relationships** overall
BTI's Industry Power Rankings

Excellence
in client service
BTI's Client Service A-Team Report

Recognized by legal research firm BTI Consulting as one of the top firms for excellent client service and client relationships, the firm's attorneys provide value through practical legal counsel infused with business insight.

PRACTICE STRENGTHS TO ALIGN TO YOUR NEEDS

- Health care
- Financial services
- Real estate
- Intellectual property
- Middle-market corporate
- Labor and employment
- Business litigation

GEOGRAPHIC FOOTPRINT SUPPORTS PRACTICE STRENGTHS

Strategically located in ***major financial centers***

Located in gateway cities, as well as offices with close proximity to critical transportation and logistical hubs

23 offices with full service capabilities

Agenda

- ✓Government Investigations regarding Anti-Trust
- ✓Restrictive Covenant Agreements and Penalty Provisions in Client Service Agreements
- ✓Pros and Cons of Arbitration Agreements
- ✓Polsinelli Online Solutions For Home Care (POSH)
- ✓Uptick in DOL Audits
- ✓Compliance Tips
- ✓Questions

Government investigations regarding anti-trust and restrictive covenant agreements and penalty provisions

Biden Executive Order re non-competes

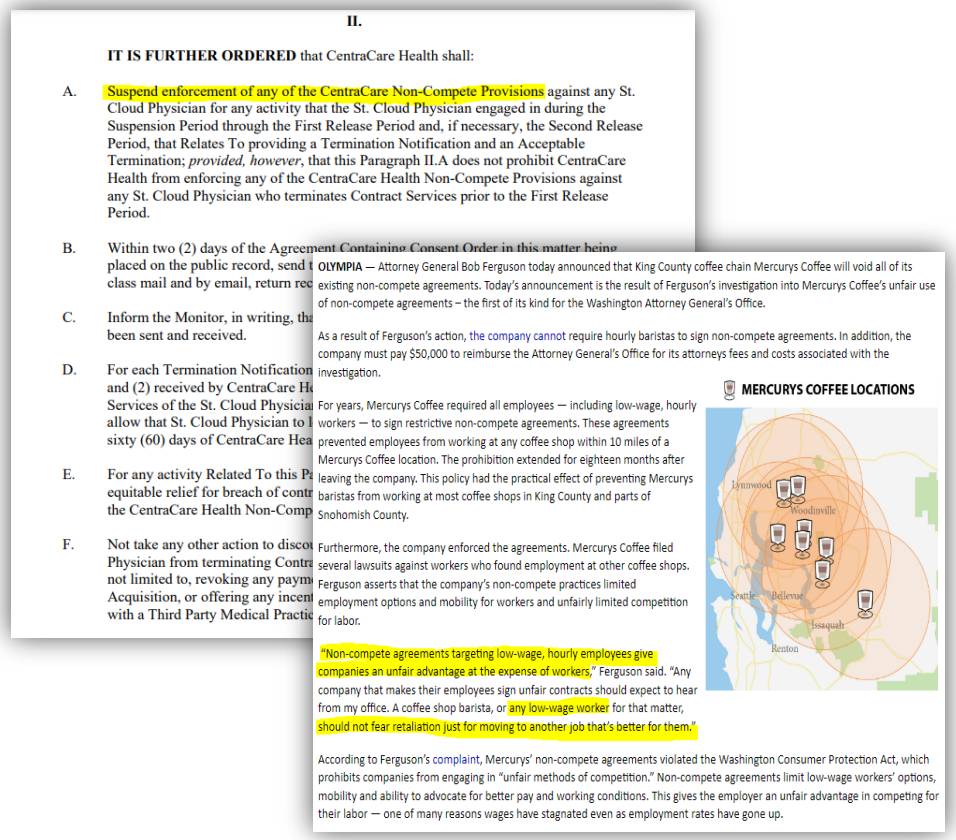
- Issued on July 9, 2021
- "Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs."
- "To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."
- The Executive Order does not change the law of restrictive covenants

Federal agencies respond

- DOJ's Antitrust Division and the Solicitor of Labor have agreed to partner in promoting competitive labor markets
- Treasury Department issued a report in March 2022 finding that lack of competition causes wage declines of about 20% for workers

Recent government activity re: Anti-trust and restrictions on worker mobility

- DOJ Targets
- No Poach clauses in franchise agreements aimed at prohibiting employees of one franchisee to work for another franchisee
- Non-competes and non-solicits
- State law differences and upcoming changes at a state level



II.

IT IS FURTHER ORDERED that CentraCare Health shall:

A. Suspend enforcement of any of the CentraCare Non-Compete Provisions against any St. Cloud Physician for any activity that the St. Cloud Physician engaged in during the Suspension Period through the First Release Period and, if necessary, the Second Release Period, that Relates To providing a Termination Notification and an Acceptable Termination; *provided, however*, that this Paragraph II.A does not prohibit CentraCare Health from enforcing any of the CentraCare Health Non-Compete Provisions against any St. Cloud Physician who terminates Contract Services prior to the First Release Period.

B. Within two (2) days of the Agreement Containing Consent Order in this matter being placed on the public record, send t
class mail and by email, return rec

C. Inform the Monitor, in writing, tha
been sent and received.

D. For each Termination Notification
and (2) received by CentraCare He
Services of the St. Cloud Physicia
allow that St. Cloud Physician to l
sixty (60) days of CentraCare Hea

E. For any activity Related To this Pa
equitable relief for breach of contr
the CentraCare Health Non-Comp

F. Not take any other action to discou
Physician from terminating Contra
not limited to, revoking any paym
Acquisition, or offering any incent
with a Third Party Medical Practic

OLYMPIA — Attorney General Bob Ferguson today announced that King County coffee chain Mercurys Coffee will void all of its existing non-compete agreements. Today's announcement is the result of Ferguson's investigation into Mercurys Coffee's unfair use of non-compete agreements – the first of its kind for the Washington Attorney General's Office.

As a result of Ferguson's action, the company cannot require hourly baristas to sign non-compete agreements. In addition, the company must pay $50,000 to reimburse the Attorney General's Office for its attorneys fees and costs associated with the investigation.

MERCURYS COFFEE LOCATIONS

For years, Mercurys Coffee required all employees — including low-wage, hourly workers — to sign restrictive non-compete agreements. These agreements prevented employees from working at any coffee shop within 10 miles of a Mercurys Coffee location. The prohibition extended for eighteen months after leaving the company. This policy had the practical effect of preventing Mercurys baristas from working at most coffee shops in King County and parts of Snohomish County.

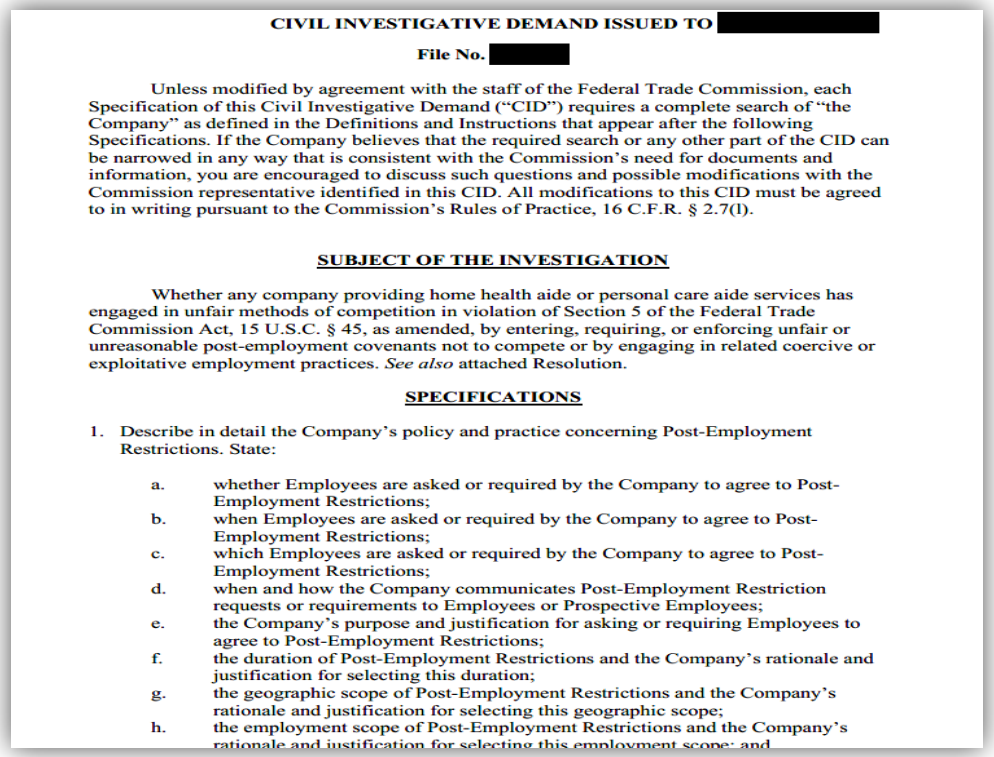
Furthermore, the company enforced the agreements. Mercurys Coffee filed several lawsuits against workers who found employment at other coffee shops. Ferguson asserts that the company's non-compete practices limited employment options and mobility for workers and unfairly limited competition for labor.

"Non-compete agreements targeting low-wage, hourly employees give companies an unfair advantage at the expense of workers," Ferguson said. "Any company that makes their employees sign unfair contracts should expect to hear from my office. A coffee shop barista, or any low-wage worker for that matter, should not fear retaliation just for moving to another job that's better for them."

According to Ferguson's complaint, Mercurys' non-compete agreements violated the Washington Consumer Protection Act, which prohibits companies from engaging in "unfair methods of competition." Non-compete agreements limit low-wage workers' options, mobility and ability to advocate for better pay and working conditions. This gives the employer an unfair advantage in competing for their labor — one of many reasons wages have stagnated even as employment rates have gone up.

FTC has started looking at home-based care providers

- Seemingly generic demand
- Unclear whether this is a fishing expedition, or the FTC knows what it wants
- Appears FTC doesn't understand home care
- But the FTC will likely learn!



CIVIL INVESTIGATIVE DEMAND ISSUED TO [redacted]

File No. [redacted]

Unless modified by agreement with the staff of the Federal Trade Commission, each Specification of this Civil Investigative Demand ("CID") requires a complete search of "the Company" as defined in the Definitions and Instructions that appear after the following Specifications. If the Company believes that the required search or any other part of the CID can be narrowed in any way that is consistent with the Commission's need for documents and information, you are encouraged to discuss such questions and possible modifications with the Commission representative identified in this CID. All modifications to this CID must be agreed to in writing pursuant to the Commission's Rules of Practice, 16 C.F.R. § 2.7(l).

SUBJECT OF THE INVESTIGATION

Whether any company providing home health aide or personal care aide services has engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, by entering, requiring, or enforcing unfair or unreasonable post-employment covenants not to compete or by engaging in related coercive or exploitative employment practices. *See also* attached Resolution.

SPECIFICATIONS

1. Describe in detail the Company's policy and practice concerning Post-Employment Restrictions. State:

   a. whether Employees are asked or required by the Company to agree to Post-Employment Restrictions;
   b. when Employees are asked or required by the Company to agree to Post-Employment Restrictions;
   c. which Employees are asked or required by the Company to agree to Post-Employment Restrictions;
   d. when and how the Company communicates Post-Employment Restriction requests or requirements to Employees or Prospective Employees;
   e. the Company's purpose and justification for asking or requiring Employees to agree to Post-Employment Restrictions;
   f. the duration of Post-Employment Restrictions and the Company's rationale and justification for selecting this duration;
   g. the geographic scope of Post-Employment Restrictions and the Company's rationale and justification for selecting this geographic scope;
   h. the employment scope of Post-Employment Restrictions and the Company's rationale and justification for selecting this employment scope; and

Recent DOJ investigation in Maine re: Wage fixing in home care

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

UNITED STATES OF AMERICA **v.** **FAYSAL KALAYAF MANAHE,** **YASER AALI,** **AMMAR ALKINANI, and** **QUASIM SAESAH** **Defendants.**	**No. 2:22-cr-00013-JAW**

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

Defendants Faysal Kalayaf Manahe, Yaser Aali, Ammar Alkinani, and Quasim Saesah (Defendants) are charged in a one-count indictment with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to fix the wages of personal support specialist (PSS) workers and to allocate PSS workers. ECF No. 1. The former is price fixing. The latter is market allocation. Both are *per se* unlawful under decades of Supreme Court and First Circuit precedent, regardless of the industry and regardless of whether the conspirators are sellers, buyers, or employers. S*ee* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶2012c (5th ed. 2021) ("A naked agreement among employers limiting salaries or wages, such as an 'anti-poaching' agreement, is unlawful per se.").

THE CHARGED CONSPIRACY

The Indictment charges Defendants with committing a *per se* unlawful offense under 15 U.S.C. § 1 by entering into a conspiracy to fix the wages of their employees and to not hire one another's employees. Indictment ¶15. The conspiracy was formed and effectuated by Defendants, each of whom is an owner or manager of a home healthcare agency that employs PSS workers in the Portland, Maine area. *Id.* ¶¶5-8, 12, 15, 16.

The goal of Defendants' conspiracy was simple: to eliminate competition for PSS workers. *Id.* ¶15. Defendants sought to accomplish this by conspiring to fix the rates their agencies paid to these workers and by agreeing not to hire each other's PSS workers. *Id.* ¶16. For example, the Indictment alleges that, between April 7 and April 9, 2020, Defendants sent text messages to one another explicitly describing the wage-fixing part of their conspiracy:

- Saesah: "Brothers, everyone has agreed that the rate is from 15-16"
- Aali: "[W]e have agreed on 15 and 16 and I started announcing it."
- Alkinani: "I am committed and told the employees 15-16"
- Kalayaf: "Yes, this is the agreement [. . .] I am still going with 15 and 16."

Id. ¶17(d). The indictment also alleges that Defendants "engaged in discussions regarding . . . refraining from hiring each other's PSS workers." *Id.* ¶17(b).

To further their conspiracy, Defendants agreed to pressure competing employers to retract their own wage increases. *Id.* ¶17(e). For example, on April 6, 2020, Defendant Aali called the owner of an agency competing for PSS workers, asked him to retract his PSS wage increase, and threatened to submit complaints to the state about him if he did not comply. *Id.* Then, between

More healthcare/anti-trust matters

- January 2021: the DOJ filed a criminal complaint against Surgical Care Affiliates because it allegedly agreed with competitors not to solicit each other's senior employees
- March 2021: a Las Vegas health care staffing company, VDA OC LLC, and its former manager were indicted for agreeing not to poach school nurses from each other and to fix their wages
- July 2021: DOJ filed a criminal complaint against DaVita and its then CEO (this was a companion case to the SCA case noted above) (full acquittal)
- January 2022: four owners and managers of home health care agencies in Maine were indicted on no-poach and wage-fixing of personal support specialists

DOJ has the most anti-trust grand jury investigations open in 30 years and that the DOJ is seeking funding to hire 120 additional attorneys and 900 FBI agents to support white collar criminal investigations and prosecutions.

Anti-trust avoidance: Best practices

- Carefully examine franchise agreements and other agreements between businesses to ensure “no-poach” clauses are removed
- Analyze anti-trust issues and responsibilities early in significant M&A transactions
- Avoid discussions or agreements with competitive businesses about wage rates

What is a non-compete agreement?

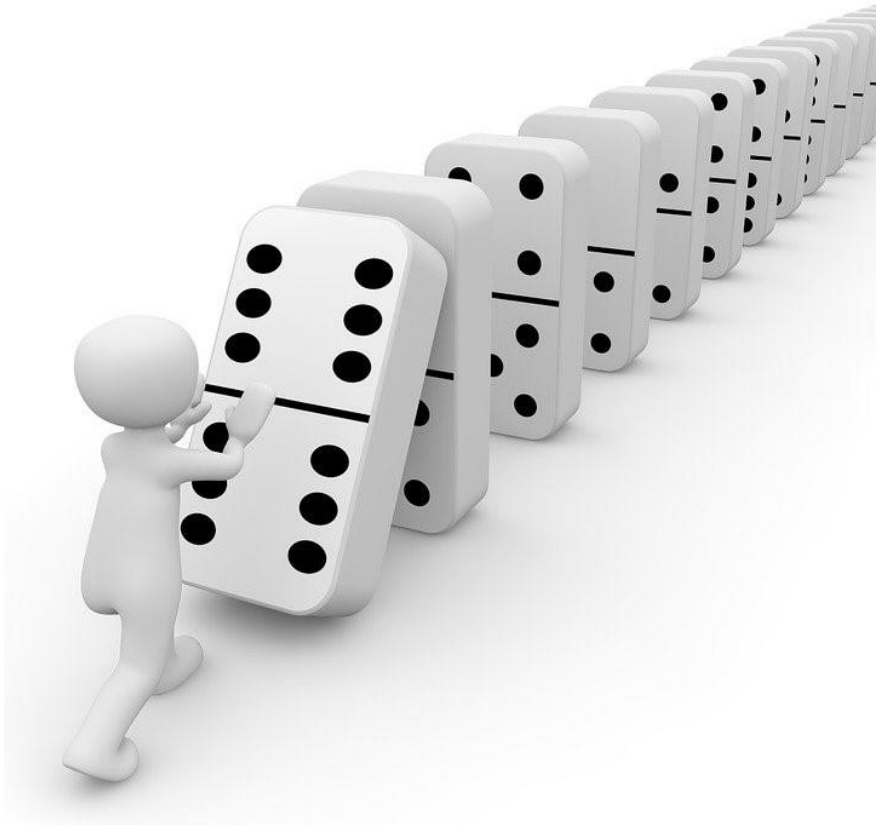
- Definition:
  A contract when an employee agrees to not compete with an employer after the period of employment is over

- Should limit to managers and critical employees and be reasonable in scope
  - Geographical region
  - Time period *(generally 2 years or less)*
  - Restriction on performing same job duties

What is a non-solicitation agreement?

- Can’t solicit former employer’s customers, or employees to leave
- Preserves use of confidential information
- Much more likely to pass review
- Directly between employer and employee

Different state non-compete laws



- California, North Dakota, Montana, and Oklahoma have enacted outright prohibitions on employee non-compete agreements in all or nearly all circumstances
- Early in 2021, Washington, D.C. enacted its own ban on non-competes
- Other jurisdictions prohibit or limit enforcement for certain types of employees, such as low-wage or entry-level workers

Different state non-compete laws

- States that permit employee non-competes differ in protectable / legitimate interest
  (i.e., some expressly protect client lists, others do not)
- 10 States currently ban non-competes for low-wage and blue-collar workers.

State	Wage Threshold
Illinois	$75,000
Maine	400% of the federal poverty level
Maryland	$15 per hour or $31,200 annually
Massachusetts	Nonexempt under the Fair Labor Standards Act
Nevada	Paid solely on an hourly wage basis, exclusive of tips or gratuities
New Hampshire	$14.50 per hour (for non-tip-based employees)
Oregon	$100,533
Rhode Island	250% of the federal poverty level for individuals or nonexempt under the Fair Labor Standards Act
Virginia	Average weekly wage in Virginia
Washington	$100,000 for employees and $250,000 for independent contractors

Oregon

- A non-compete entered after January 1, 2022 will be “void” if:
  - The non-compete period extends longer than 12 months;
  - It applies to employees earning less than $100,533.00 in 2021 dollars adjusted for inflation;
  - It was not provided in writing to a new employee at least two weeks before the employee’s first day;
  - The employer did not provide the employee with a copy of the signed non-compete agreement within 30 days following the employee’s termination;
  - The employee is not engaged in administrative, executive, or professional work, performing predominantly intellectual, managerial, or creative tasks; further, the employee must exercise discretion and independent judgment; and be paid on a salary basis; or
  - The employee does not have access to either trade secrets or sensitive confidential business or professional information.

Colorado

- Colorado law prohibits non-compete agreements except in certain circumstances, such as when agreements are made:
  - For the recovery of expenses incurred in educating and training employees who were employed for less than two years; or
  - With executive and management personnel, and their professional staff and officers
- Colorado also prohibits any covenants entered into through the use of force, threats or "other means of intimidation" to prevent an individual from engaging in any lawful occupation
- Beginning March 1, 2022, any violations of Colorado's non-compete statute may constitute a Class 2 misdemeanor, with a penalty of $750 or up to 120 days imprisonment per violation, or both.

Illinois

- Illinois new non-compete law went into effect on January 1, 2022
  - **It's not retroactive**
- Act that bans the use of **non-competes** for employees who's annualized or expected earnings are less than $75,000
- Act bans the use of **non-solicits** for those who's annualized or expected earnings are less than $45,000
- Employees at all income levels will remain bound by statutory limitations on the acquisition, use, or disclosure of trade secrets

Connecticut House Bill 5506

- § § 246 & 247 — BAN ON NON-COMPETE CONTRACTS IN **CLIENT AGREEMENTS**
- This new law, which became effective upon enactment on May 7, 2022, prohibits "no-hire" provisions in contracts between a homemaker-companion agency and a client
- A "no-hire" clause is defined as a provision that
  - Imposes a financial penalty
  - Assesses any charges or fees, including legal fees; or
  - Contains any language that can create grounds for a breach of contract assertion or a claim for damages or injunctive relief against the client for directly hiring an employee of such agency.
- The law expressly deems these clauses against public policy and void.

Connecticut continued

- Since July 1, 2019, Connecticut has prohibited “covenants not to compete” for caregivers
- A covenant not to compete means:
  - Any agreement or contract that restricts the right of an individual to provide companion services, home health services or homemaker services (A) in any geographic area of the state for any period of time, or (B) to a specific individual

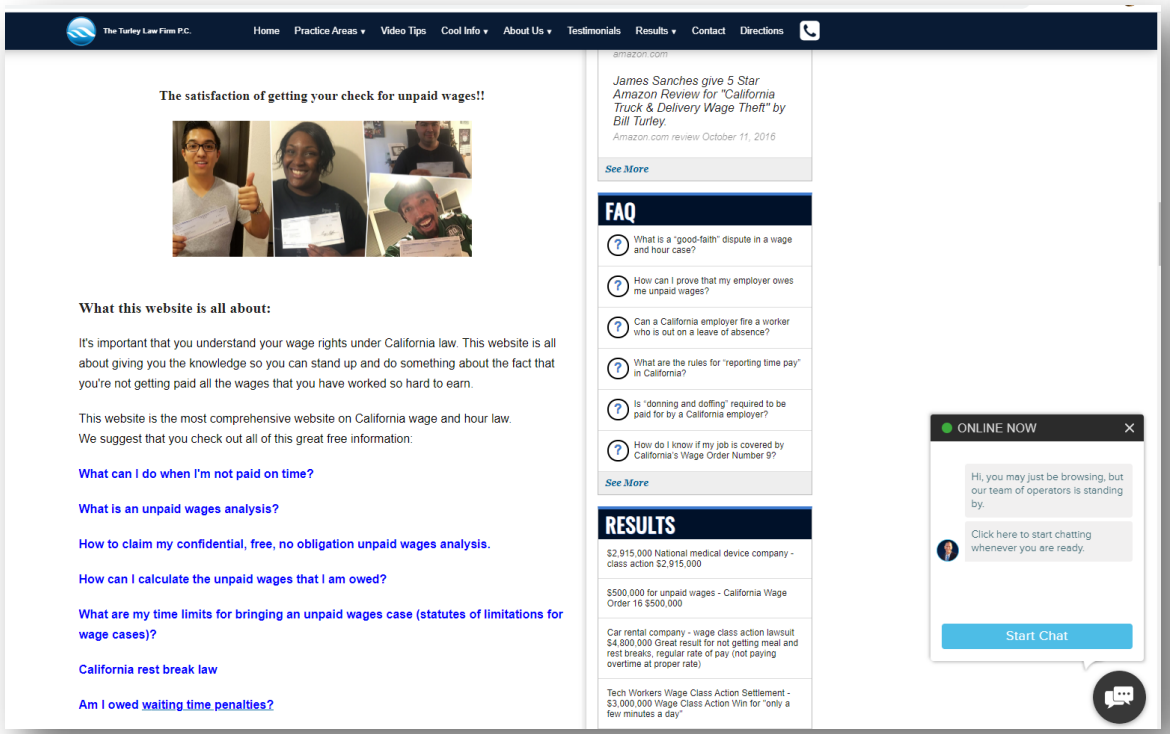
Arbitration agreements

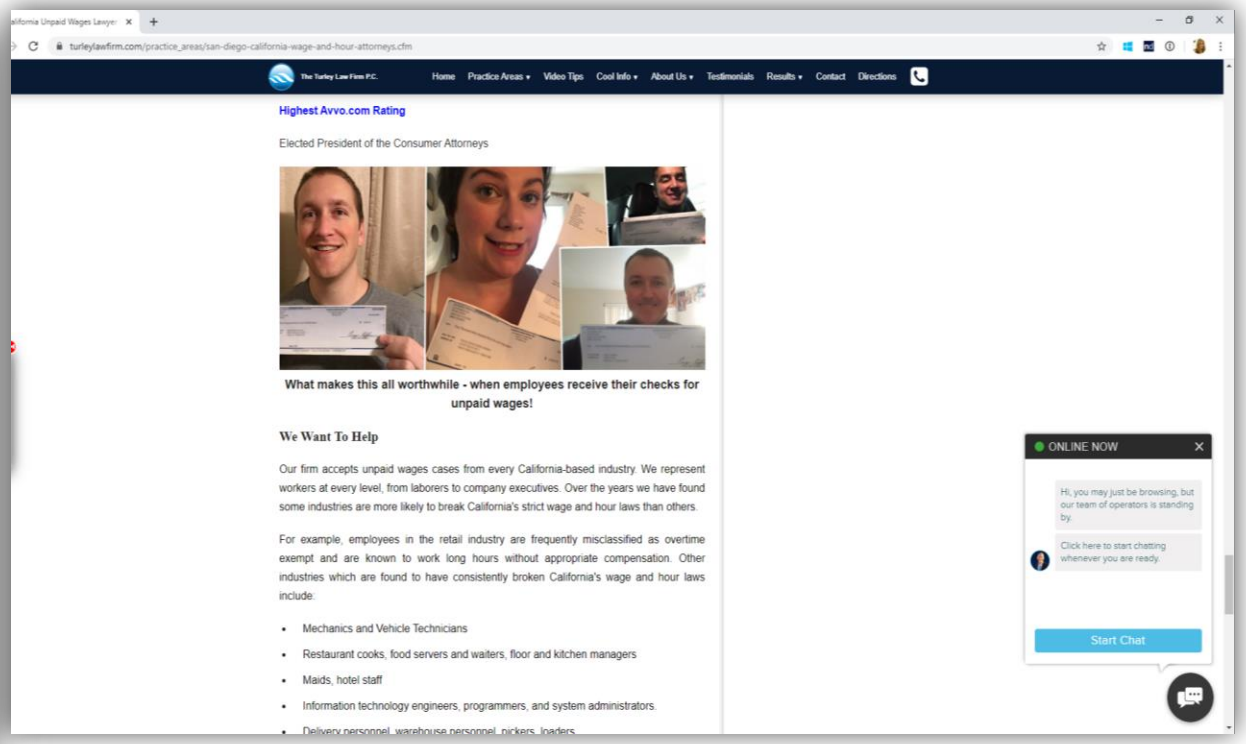
Use of arbitration agreements with class action waivers

- *AT&T Mobility v. Concepcion*: April 2011, U.S. Supreme Court held that class action waivers in arbitration agreements are enforceable
- Companies have responded by revising employment contracts to add mandatory arbitration clauses that preclude class representation
- Pros and cons of arbitration
- Practical steps for employers in implementing mandatory arbitration program

Plaintiff's attorneys are looking for class actions

More examples of solicitations. . .





Avoiding the law of BIG NUMBERS

- Jane, a caregiver, works 40 hours a week.
- The company pays Jane $12 per hour. Jane works from 9:30 a.m. to 1:00 p.m. *(3.5 hours),* and then drives an hour to the second client's home and begins work from 2:00 p.m. to 6:30 p.m. *(4.5 hours).*
  - 3.5 hours with client 1 + 4.5 hours with client 2 = 8 hours.
- Jane does this five days a week, and the company pays Jane for 40 hours per week
- BUT the travel time between worksites was compensable under federal law because it is a "principal activity."

Avoiding the law of BIG NUMBERS

- Because the company has not paid Jane for the 60 minutes she drove from worksite to worksite each day, the company owes Jane for this time for 5 days per work each week.
- 5 workdays x 1 hour between shifts = 5 hours. This carries Jane's working hours per week to 45
  - 5 overtime hours x (1.5 x 12) = $90 / week.
- Thus, Jane is owed $90 per week in unpaid overtime wages.
- So what? That's not bad.

You said what?!!

- It might seem like that at first blush. But what if this happens every week, for a year. Then seven months after she gets fired or quits Jane contacts an attorney.
- Jane works 48 weeks during the year. The Company pays their employees every Friday.
- **In missed overtime payments, Jane is owed 48 (weeks worked) x $90 / week.**
- $ 90 Unpaid weekly overtime wages
  x 48 Number of weeks worked
  $ 4,320 Total unpaid overtime wages owed from just travel time

Now it REALLY gets worse

- Now factor in that you have 50 similarly situated employees over a two-year period and Jane's attorney turned her case into a class action lawsuit.
- Can you see how this can add up really fast?
- 50 x $4,320 = **$216,000**
- This amount will likely be doubled based on the liquidated damages provision of the FLSA: **$432,000**
- This is just for unpaid overtime from travel time and does not include inclusion of a third year ($216,000) and attorneys' fees (**$259,200** at 40% contingency). Grand total: **$907,200** before even adding a dollar of defense costs.



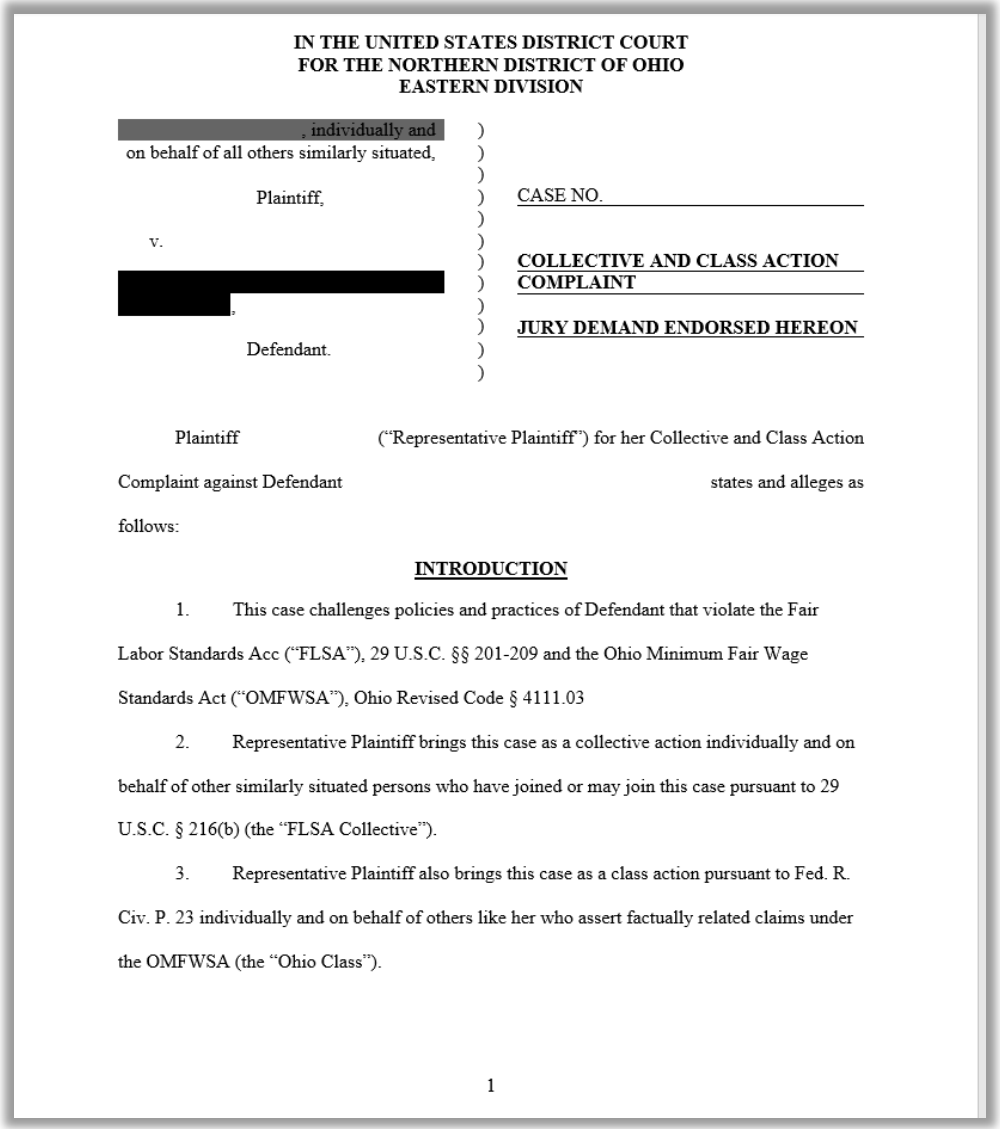

Advantages of arbitration vs. court litigation

- Reduced costs v. litigation
- Privacy / confidentiality
- Substantial control over choice of arbitrators
- Lack of jury reduces settlement value
- Avoids “runaway” jury awards
- Process is often faster
- Class action waivers

Disadvantages of arbitration

- Costs are increasing, especially because employers generally pay all costs
- Arbitrators may be less likely to grant summary judgment and other dispositive motions
- Reduced appellate rights
- Tendency to “split the baby”
- Less predictability
- Risk of multiple arbitrations

Backburner? Before you do, check this out!



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[redacted], individually and on behalf of all others similarly situated,

Plaintiff,

v.

[redacted],

Defendant.

CASE NO.

COLLECTIVE AND CLASS ACTION COMPLAINT

JURY DEMAND ENDORSED HEREON

Plaintiff ("Representative Plaintiff") for her Collective and Class Action Complaint against Defendant states and alleges as follows:

INTRODUCTION

1. This case challenges policies and practices of Defendant that violate the Fair Labor Standards Acc ("FLSA"), 29 U.S.C. §§ 201-209 and the Ohio Minimum Fair Wage Standards Act ("OMFWSA"), Ohio Revised Code § 4111.03

2. Representative Plaintiff brings this case as a collective action individually and on behalf of other similarly situated persons who have joined or may join this case pursuant to 29 U.S.C. § 216(b) (the "FLSA Collective").

3. Representative Plaintiff also brings this case as a class action pursuant to Fed. R. Civ. P. 23 individually and on behalf of others like her who assert factually related claims under the OMFWSA (the "Ohio Class").

Federal and state class action

COLLECTIVE ACTION ALLEGATIONS

20. Representative Plaintiff incorporates by reference the foregoing allegations as if fully rewritten herein.

21. Representative Plaintiff brings this case as a "collective action" pursuant to 29 U.S.C. § 216(b) on behalf of the following collective:

> **All present and former homecare providers, including but not limited to HHAs, employed by Defendant who worked at more than one location in the same workday and who worked 40 or more hours in the same workweek from the 3 years preceding the filing of this Complaint through final disposition of this action ("FLSA Collective").**

22. Such persons are "similarly situated" with respect to Defendant's FLSA violations in that all were hourly employees of Defendant, and all were subjected to and injured by Defendant's unlawful practices of failing to pay them all overtime hours worked.

23. The FLSA Collective members have the same claims against Defendant for unpaid overtime compensation as well as for liquidated damages, attorneys' fees, and costs.

24. Conditional certification of this case as a collective action pursuant to 29 U.S.C. §216(b) is proper and necessary so that such persons may be sent Court-authorized notice informing them of the pendency of this action and giving them the opportunity to "opt in."

OHIO RULE 23 CLASS ACTION ALLEGATIONS

25. Representative Plaintiff further brings this action pursuant to Fed. R. Civ. P. 23(a) and (b)(3) on behalf of herself and the following class:

> **All present and former hourly homecare providers, including but not limited to HHAs, employed by Defendant in Ohio who worked at more than one location in the same workday and who worked 40 or more hours in the same workweek from the 2**

Boom!

Hi Angelo,

You can ignore my last email. I gave these a look and talked to Ms. Brown. We will be dismissing the Complaint without prejudice. I appreciate you getting these records to me so quickly.

Have a safe flight.

From: Angelo Spinola <aspinola@polsinelli.com>

Cc: Anne Mellen <amellen@polsinelli.com>; Helen Tecklenburg <HTecklenburg@Polsinelli.com>

I was able to find a little time to get this out before boarding my flight. Please find Ms. Brown's time detail and pay stubs demonstrating payment of both travel time and mileage as well as her arbitration agreement. I appreciate your professionalism on the phone and hopefully to get this one quickly resolved. Please confirm receipt. Thank you.

Angelo

Angelo Spinola
Shareholder
Co-Chair of the Home Health Home Care and Hospice Practice

aspinola@polsinelli.com
404.253.6280
1201 West Peachtree Street NW, Suite 1100
Atlanta, GA 30309

Arbitration legislation

- March 3, 2022 – Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021
  - Prohibits employers from requiring arbitration of workplace sexual harassment or assault claims
  - Applicability of the Act will be determined under federal law and by a court, rather than an arbitrator
- U.S. House Passes Bill Banning Mandatory Arbitration Agreements
  - FAIR Act passed 222-209 in March 2022
  - The legislation would prohibit pre-dispute arbitration agreements from being valid or enforceable when they require arbitration of an employment, consumer, antitrust, or civil rights dispute
  - Likely will not pass in the Senate (similar legislation failed in the Senate in the last Congress)

Logistics of rolling out arbitration agreements

- Distributing arbitration agreements
  - Email
  - In person
  - Signed acknowledgments of receipt
  - Talking points and FAQs
- Collecting signed arbitration agreements
  - Electronic records of signed agreements
  - Physical personnel file
- Collecting and recording opt outs
  - Dedicated email or department address
  - Filing opt outs

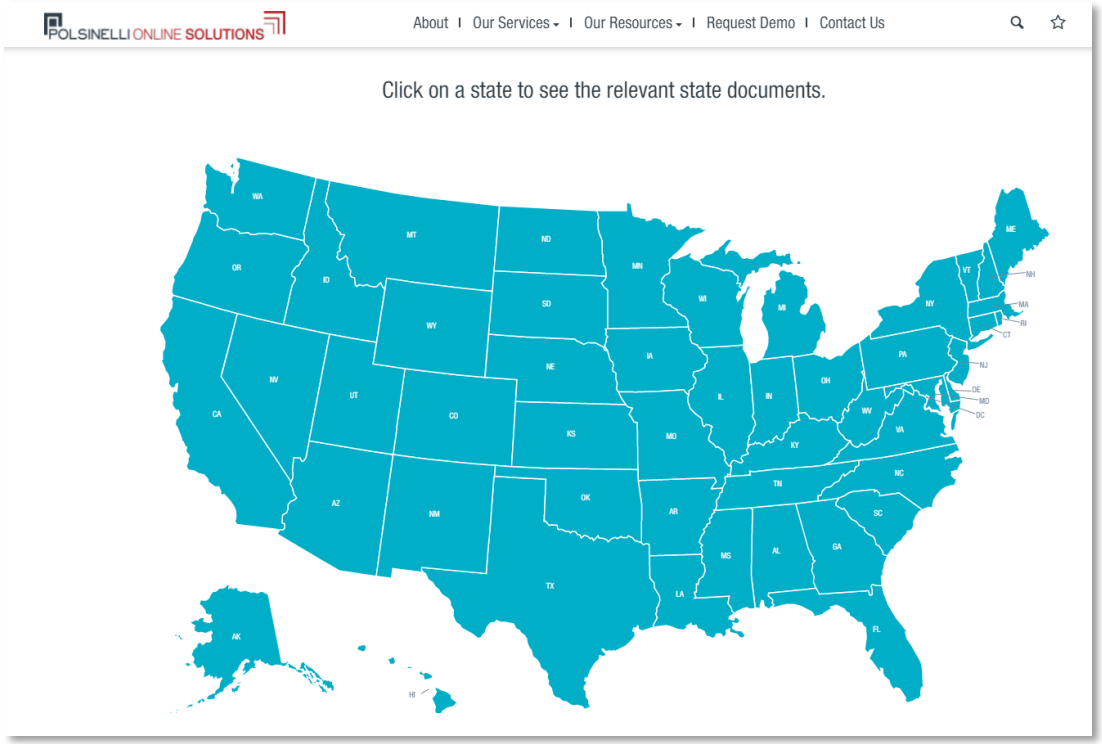
Polsinelli Online Solutions For Home Care (POSH)

Other frequent state/city law differences

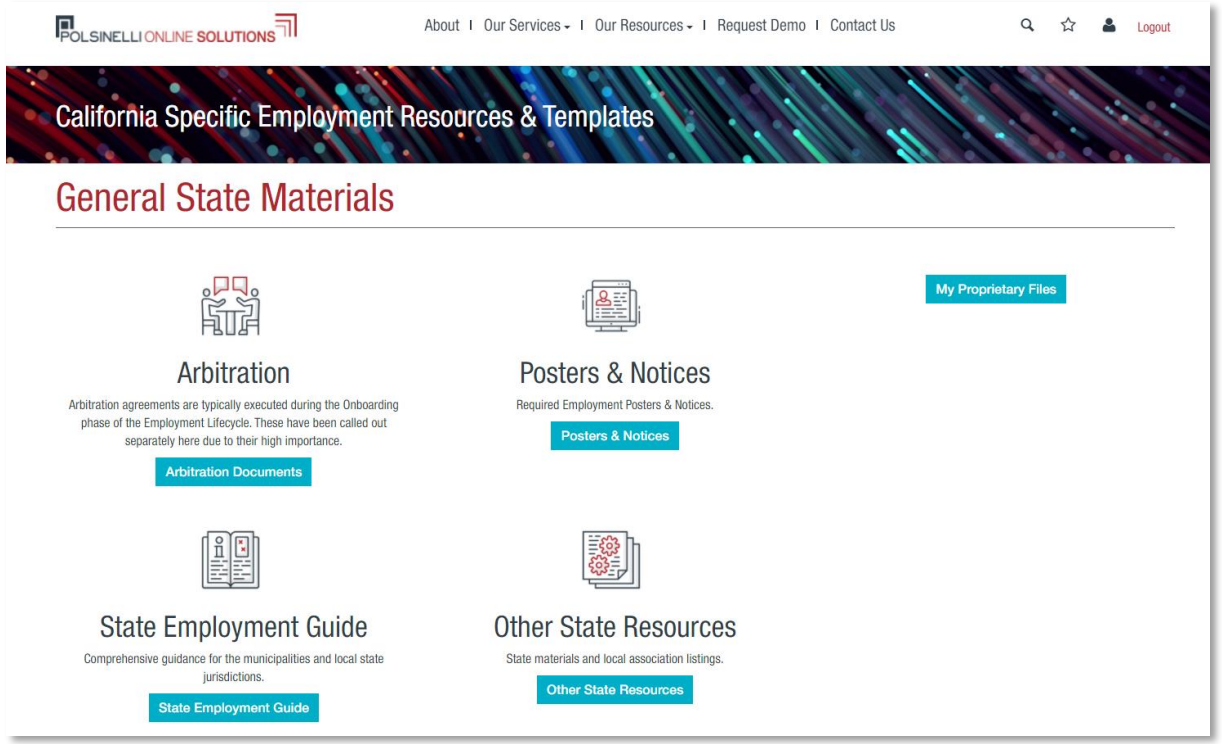
Minimum wages	Predictive scheduling	Wage theft notices	Meal and rest breaks	Paid sick/ Family leave	Domestic Worker Bill of Rights	Business expense reimbursements
Show up pay requirements	Split shift premiums	Sleep time deductions	Meal and lodging credits	Employee training requirements	Notice and pay upon termination provisions	Anti-arbitration laws
Independent contractor tests	Background check process	Salary inquiry bans	Requirements for employment agreements	Predictive scheduling	Fair chance hiring	Equal pay
Caregiver Information Disclosure Acts	Mandatory training requirements	Notice provisions for termination	Unique equal employment protections	Pay stub requirements	Terms of client service contracts	Terms permitted in separation and release agreements

State specific resources

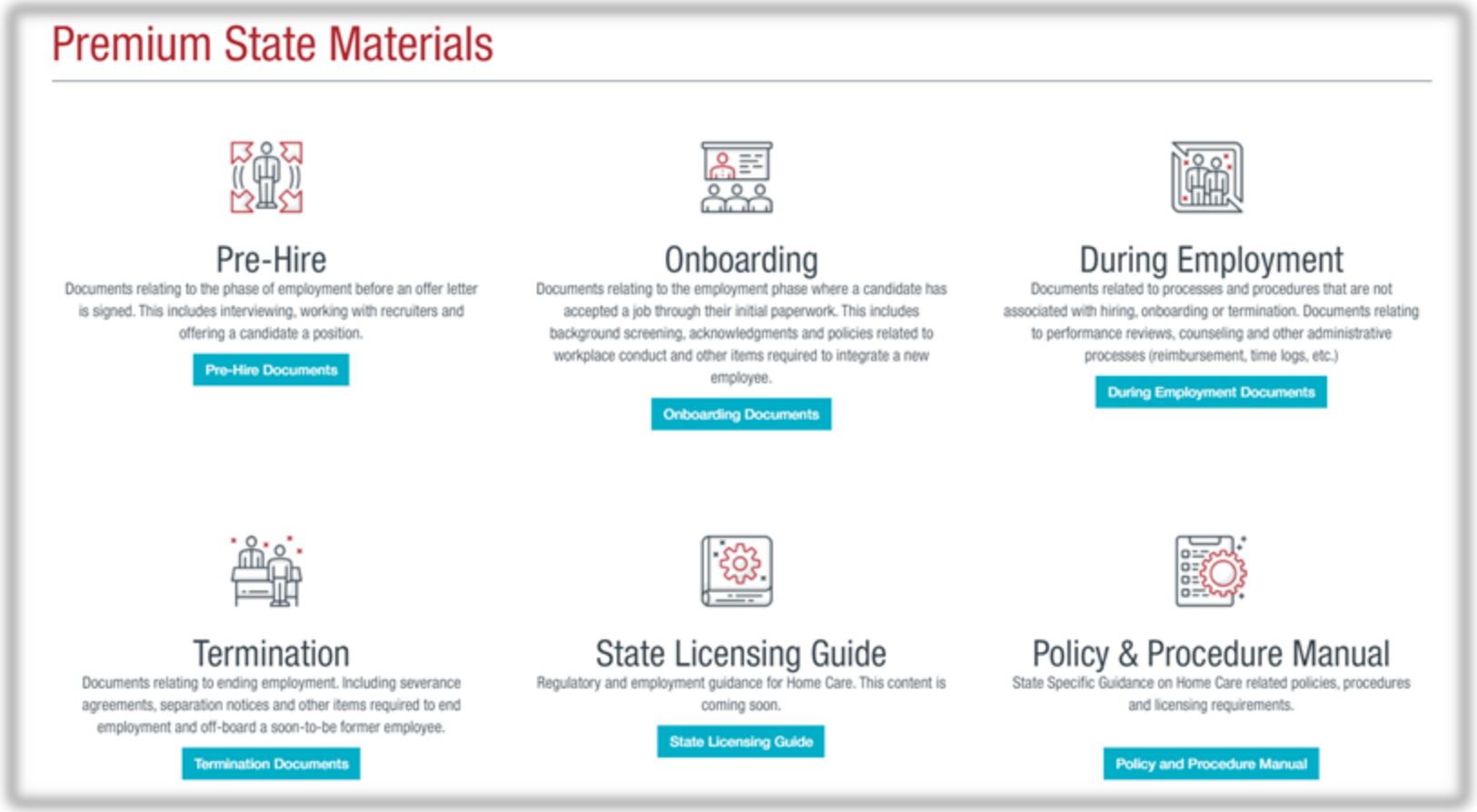
State Specific Materials and Information



Options within each state (base)



POSH – Premium Resources



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or

text **CARE** to **833.986.3448**

DOL Audits

US DOL announcement on investigators

News Release

US DEPARTMENT OF LABOR ANNOUNCES PLANS TO HIRE 100 INVESTIGATORS TO SUPPORT ITS WAGE AND HOUR DIVISION'S COMPLIANCE EFFORTS

Division seeks to build out enforcement team nationwide

WASHINGTON – The U.S. Department of Labor today announced that its Wage and Hour Division is seeking to add 100 investigators to its team to support its enforcement efforts including the protection of workers' wages, migrant and seasonal workers, rights to family and medical leave and prevailing wage requirements for workers on federal contracts.

The Wage and Hour Division is one of the nation's most essential labor law enforcement agencies, responsible for enforcing some of the most comprehensive labor laws affecting more than 148 million workers. The cornerstone of its enforcement team, investigators' responsibilities include the following:

- Conducting investigations to determine if employers are paying workers and affording them their rights as the law requires.
- Helping ensure that law-abiding employers are not undercut by employers who violate the law.
- Promoting compliance through outreach and public education initiatives.
- Supporting efforts to combat worker retaliation and worker misclassification as independent contractors.

"Adding 100 investigators to our team is an important step in the right direction," said Acting Wage and Hour Administrator Jessica Looman. "We anticipate significantly more hiring activity later in fiscal year 2022. While appropriations will determine our course of action, we are optimistic we will be able to bring new talented professionals onboard to expand our diverse team."

In fiscal year 2021, the Wage and Hour Division collected $230 million in wages owed to 190,000 workers. Division representatives also conducted 4,700 outreach events to educate employers and workers alike about their workplace rights and responsibilities.

Search "usajobs.gov" to learn more about the available Wage and Hour Division positions, and to apply.

Learn more about the Wage and Hour Division.

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Media Contact: Edwin Nieves

Handling a DOL audit

- Worth Reviewing:
  - exempt employee classification
  - independent contractor classification
  - FMLA compliance and other leave issues
- DOL can audit employers at any time
  - most common reason = employee complaint
  - DOL has also targeted employers in low-wage industries for wage and hour violations

What to expect

- The DOL typically provides little advance notice of an audit.
  - you can request time to gather records.
- Contact the auditor to find out specific information about the audit.
  - Key questions to ask are the focus of the investigation (e.g., overtime pay compliance, exempt vs. nonexempt classification, minimum wage compliance), the time period for records the auditor wants to review, and the names of any employees that may be interviewed.
- Gather the records in accordance with guidance provided by the auditor.
  - Be prepared to provide documentation related to the company compensation policies and procedures. Keep track of exactly what information was provided. Do not provide records other than what the auditor requests.

What to expect continued

- Designate one or two company representatives to work with the auditor.
  - Some employers choose to designate their company's legal counsel; other employers will designate senior managers. The representatives will have the duty to provide documents requested, arrange for any additional records to be provided to the auditor (if necessary) and coordinate employee interviews.
- During the audit, be courteous to and cooperative with the auditor.
  - It is a good practice to provide a quiet area for the auditor to work in.
- At the end of the audit, ask the auditor to provide a summary of the results of the investigation.
  - This information will help an employer review options for resolutions if any violations are found. If violations are found, employers are encouraged to consult legal counsel before any settlements are reached with the DOL

Compliance tips for avoiding pay claims from non-exempt home-based employees

Compliance is the best defense

Strong legal presumption that all employees are entitled to minimum wage and overtime pay.

- Burden is always on the employer to establish an exception from the general rules.
- Workers cannot waive their rights.
- Violations are “strict-liability” offenses.

The best defense is a good offense.

- Train workers *and* supervisors.
- Implement good policies and consistently enforce them.
- Documentation—practices are only as good as the proof.

Preparing for pay practice claims

- Identify payroll practices vulnerable to litigation challenge.
- Conduct “day one” litigation analysis to test existing defenses and evidence.
- Develop and amplify evidentiary support.
- Mitigate identified litigation risk through corrective measures.

Minimize risk of potential liability

- Develop evidence which shows:
  - Employer is committed to accurate and timely payment of wages
  - Employees understand:
    - What is working time
    - How to accurately report all working time
    - What to do if not paid correctly or someone instructs them to work off-the-clock
    - How to report remote work
    - How to report missed or interrupted meal period
    - Who to contact with questions or complaints

Important policies for home care employees

- Explaining overtime eligibility
- No off-the-clock work
  - Pre-and Post-Shift Work
- Explaining meal and rest periods
- Travel, including addressing “continuous workday” issues (e.g., calling patients before leaving home)
- Record all working time
- For employees paid per visit:
  - Ensure policies explain that all visit-related activities are compensated via the visit rates
  - Consider advantages of transitioning to salary-plus compensation system

An effective compliance program for non-exempt employees

Wage and hour policies
Eliminate assumptions
Complaint and investigation procedures
Training
Audits
Arbitration agreements with class waivers

Questions?

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