



## Wage and Hour Guide for Residential Care Facilities in California & Current Industry Trends – 2020 Update

*October 22, 2020*

**Littler**

Presented by



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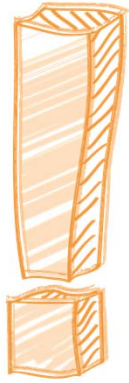
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## IMPORTANT NOTICE



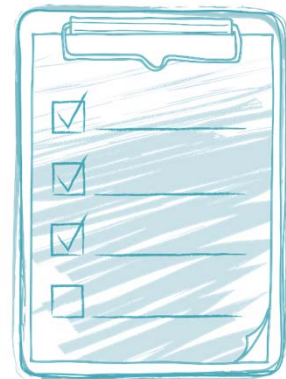
This presentation is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. This presentation is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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## Agenda

- Current Trends in Litigation in the Healthcare Industry
- COVID-19 Wage and Hour Landmines
- Wage and Hour Resource Center For Residential Care Facilities
- Recap of Federal Sleep Exemptions and Related Requirements
- Q & A Session



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## Examination of Residential Care Facilities

- In February 2013, the DOL announced its **focus on California residential care facilities**, explaining: “Three California district offices of the Wage and Hour Division are conducting investigations of pay practices at residential care homes for the elderly and adults with disabilities”
- DOL’s Sacramento District Office had already “identified **significant concerns** at the 70 homes inspected since the initiative began in October”
- On June 12, 2014, the DOL announced: “Residential care home providers and skilled nursing facilities in Northern California have agreed to **pay back wages and damages to employees for violations** of the Fair Labor Standards Act.”



## Examination of Residential Care Facilities

- Both DOL and DLSE have continued cracking down on wage and hour issues at residential care facilities
- Quotes from recent reports about citations:
  - “Many employers in the residential home care field continue to fail to properly compensate workers for their long, hard work in this crucial but challenging field. Better cared-for workers results in better cared-for patients.”
    - Rodolfo Cortez, Director, Wage and Hour Division, San Diego District Office
  - “Employers must pay their employees for all of the hours that they work. The resolution of this case demonstrates our commitment to ensuring that workers receive the wages they have legally earned, and that employers compete on a level playing field.”
    - Justin Emerick, Assistant District Director, Wage and Hour Division, San Diego District Office.



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## Wage and Hour Laws

- **Federal Law:** Fair Labor Standards Act
- **California Law:** California Labor Code and
  - Industrial Welfare Commission Wage Orders
    - Wage Order 5
  - California requirements vary from federal requirements
    - Minimum wage
    - Overtime
    - Meal and rest periods
    - Recordkeeping

*Employers must comply with both federal and state law*



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## Commonly Targeted Practices: Understand and Learn to Avoid

- Not paying orientation, training
- **Misclassifying independent contractors**
- **Reported hours being inconsistent with other records**
- Rounding above certain intervals or pattern of rounding down
- Delaying pay if time sheets or paperwork are late
- Not reimbursing mileage
- **Manipulation of pay rates**
- **No sleep agreement for live-ins/ 24-hour caregivers**
- **Missed or interrupted meal periods**
- Not including on-call pay and bonuses in overtime
- Not paying for meetings and “non-productive” time
- **Paying shift time vs. actual hours worked**

### Lawyers Predict a 'Huge Explosion' in Worker Class Actions Over COVID-19

So far, employees for the government, a hand bell factory and a hair salon have filed class actions, and lawyers predict many more to come, as about 22 million people file for unemployment claims.

By Amanda Bronstad | April 16, 2020 at 06:00 PM

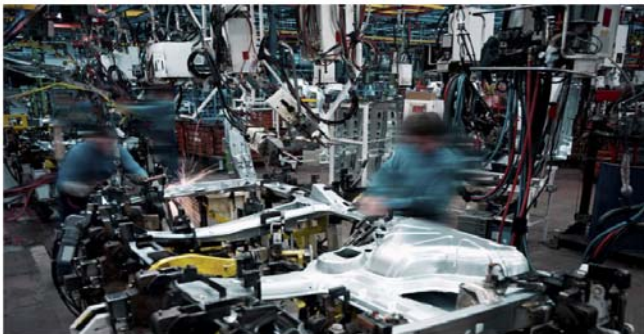


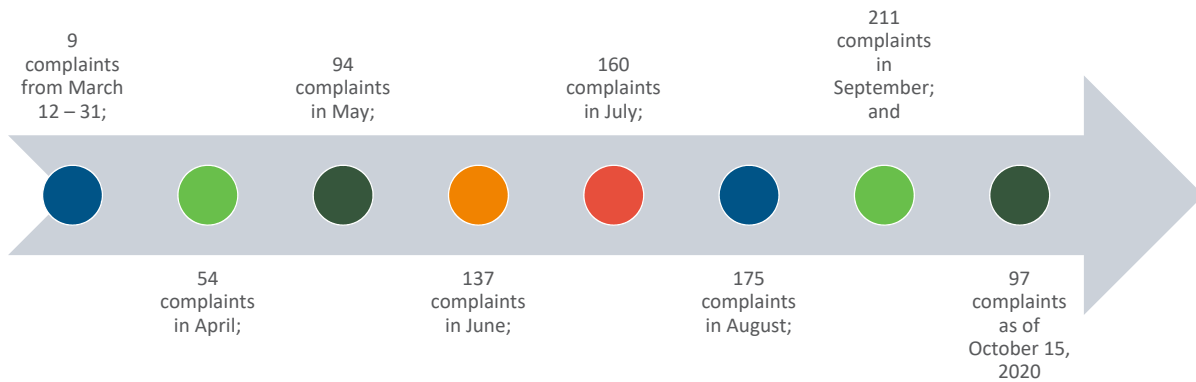
Photo: Shutterstock.

Law.com

## Coming Wave of COVID-19 Litigation

## COVID-19 Labor & Employment Litigation

Since March 12, there have been 937 lawsuits (including 96 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus.



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## COVID-19 Labor & Employment Litigation

- California is leading the way with 193 cases filed as of October 15, 2020.
  - 168 State court filings
  - 25 Federal court filings
- The healthcare industry has been hardest hit by COVID-19 related employment litigation with 227 alleged violations as of October 15, 2020.



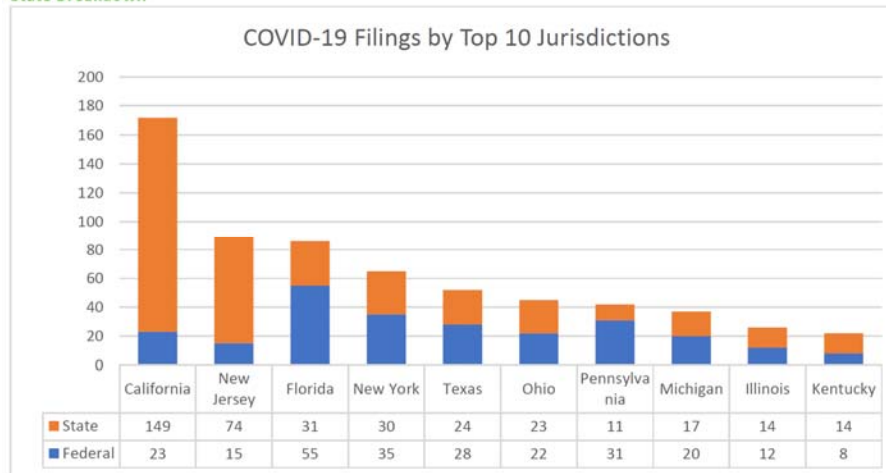
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## Increased Litigation So Far

State Breakdown

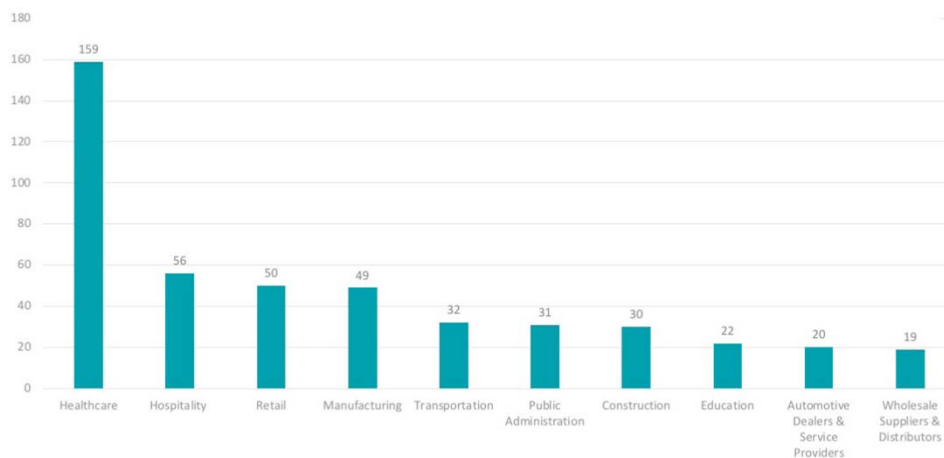


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## Litigation Trends – Lawsuits by Industry (notice Healthcare!)



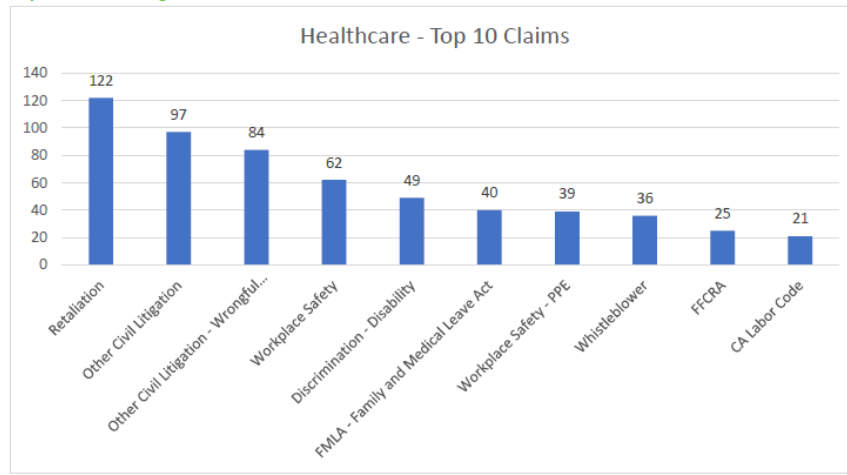
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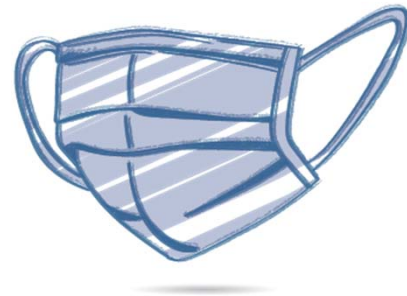
## COVID-19 Labor & Employment Litigation

Top 5 Industries Targeted



## COVID-19 Labor & Employment Litigation

- Some recently filed cases in the Healthcare Industry
  - Employee sued Employer for constructive termination from her job as a CNA after she complained about the lack of adequate protections for Employees from Covid-19 and substandard patient care.
  - Employee sued Employer for age and disability discrimination and wrongful termination alleging that Employer refused to accommodate the 72 year-old Employee's request to work from home as a counselor because Employee faces heightened risk of developing complications from Covid-19. Instead, Employer placed Employee on an indefinite, unpaid personal leave of absence.





## COVID-19 Labor & Employment Litigation

- Recent lawsuits (continued)
  - Employee sued Employer for retaliation for engaging in protected activity and for wrongful termination for firing Employee due to Employee reporting Employer's failure to follow COVID protocols, among other things.
  - **Class Action Lawsuit:** Employee sued Employer for failure to provide necessary protective equipment for its travel nurses who worked directly with Covid-19 patients, and also alleged wage and hour claims. Employee refused management's alleged orders to re-use paper masks and her contract was not renewed.



## COVID-19 Wage and Hour Landmines

## Off-the-Clock Work

- Tracking time for employees working from home
  - Home work for administrative employees difficult to track
  - Need to scrutinize continuously how we are capturing home work time
- What is work?
  - Donning & doffing of masks and PPE
  - Temperature checks and health screenings
  - Commute time?



## Overtime Pay Calculations

- New types of incentives for non-exempts to continue or return to work
  - “Hazard Pay”
  - Hardship Bonuses
  - Return to Work Bonus



## “Hazard” or “Hero” Pay Issues – Non-Exempt Employees

### Alvarado v. Dart Container Corporation (CA Supreme Court, 2018)

- Court found that non-discretionary bonus compensation paid to non-exempt employees in California must fall into one of two types – production bonus amounts or flat sum bonus amounts
  - **Production bonus** amounts are subject to the standard FLSA overtime calculation
  - **Flat sum bonus** amounts are subject to a different calculation that results in greater overtime payment



## CA Issue: Production or Flat-Sum Bonus

### Production Bonus

- The bonus is earned over every hour an employee works, including both straight time and overtime
- The bonus amount will normally increase or decrease based on the number of hours worked
  - Example: An extra 50 cents per hour paid to an employee for agreeing to work a specific shift
  - Example: Employee gets an extra \$5.00 an hour for periods of high production
- Subject to the standard FLSA overtime calculation
  - Bonus amount is divided by the total hours worked in the relevant measuring period, that amount is multiplied by .5 (i.e., cut in half), and the resulting overtime rate is multiplied by the number of overtime hours worked in the relevant period
  - This is the overtime calculation you all already know and love!

## CA Issue: Production or Flat-Sum Bonus

### Flat-Sum Bonus

- The bonus is not designed to be an incentive for increased production
- The bonus amount does not vary in proportion to the amount of hours worked by the employee
  - Example: Retention bonus paid to employees who stay the entire year
  - Example: Certification bonus paid out once per year to all employees who maintain some professional certification or licensure
  - Example: “Success sharing” bonus based on company’s performance paid out every month to employees
  - Example: An additional \$200 because employee agreed to work a hard-to-staff shift
  - Example: A \$300 a week “hero” bonus for working during COVID-19

## CA Issue: Production or Flat-Sum Bonus

### Flat-Sum Bonus

- Subject to a CA specific overtime calculation
  - Overtime: Bonus amount is divided by the actual number of regular hours worked in the relevant measuring period, that amount is multiplied by 1.5, and the resulting overtime rate is multiplied by the number of overtime hours worked in the relevant period
  - Double time: Bonus amount is divided by the actual number of regular hours worked in the relevant measuring period, that amount is multiplied by 2.0, and the resulting double time rate is multiplied by the number of double time hours worked in the relevant period
- This is because the bonus is not earned during overtime hours
  - Remember, a flat sum bonus will typically be earned regardless of whether overtime hours are even worked

## The Boundary Between Personal And Work Expenses Is Blurred

- Before COVID hit, claims for expense reimbursement were starting to expand:
  - Cell phone reimbursement
  - Internet reimbursement
  - Mortgage
  - Property tax
  - Homeowner's insurance
  - Electricity
  - Water
  - Trash collection



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## The Boundary Between Personal And Work Expenses Is Blurred

- **After COVID hit, expense reimbursement claims have expanded:**
  - Thermometers for employees who have been asked to take their temperatures at home
  - The cost of laundering masks on a daily basis
  - The cost of laundering uniforms on a daily basis



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## The Boundary Between Personal And Work Time Is Blurred

**After COVID hit, several new potential off-the-clock theories have surfaced, including:**

- Time spent participating in temperature checks at work is work
- Time spent waiting in line for temperature checks at work is work
- Time spent conducting temperature checks at home is work
- The time spent commuting between home and work after a temperature check is work
- Time spent laundering masks or other clothing required for work is work

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## ***New*** COVID-19 Paid Sick Leave Laws

**Federal (Families First Coronavirus Response Act)  
California State and Various Separate City and  
County Ordinances/Orders**

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## FFCRA – March 18, 2020

- 80 hours paid leave for COVID-related reasons.
- Tax credits!
- Applies to businesses which employ fewer than 500 employees.
- Also excludes **some** health care workers and emergency responders.

## Into The Gap!

- States and cities began to fill these gaps, requiring paid leaves for those working for businesses with  $\geq 500$  employees, and for health care and emergency responders.



## California: CCSPSL (AB 1867)

- Fills the “gap” left by FFCRA: applies to the California employees of “hiring entities” with  $\geq 500$  employees in the U.S. **OR** “hiring entities” that employ health care providers and emergency responders who excluded those employees from paid sick leave under the FFCRA.
- 80 hours of paid, COVID related leave.
- Fills another FFCRA gap – health care workers and emergency responders are eligible.



## AB 1867 – Watch Out!

- WAGE STATEMENTS: Employers must show available CCSPSL on employees' wage statements (or provide other written notice)
- Effective in the pay period following September 9.
- RECORDKEEPING: Retain records for three years – hours worked, leave provided, and leave used by an employee.
- RATE OF PAY: Highest of *regular rate* for last pay period, state minimum wage or local minimum wage.





## California Cities with Gap Laws: 10 and Counting

1. Long Beach
2. City of Los Angeles
3. County of Los Angeles
4. Oakland
5. Sacramento
6. San Francisco
7. San Jose
8. County of San Mateo
9. Santa Rosa
10. Sonoma County



## Littler Links

- **New CA Laws Overview:** <https://www.littler.com/publication-press/publication/california-imposes-new-compliance-obligations-employers>
- **COVID Notice:** <https://www.littler.com/publication-press/publication/california-ab-685-imposes-new-notice-and-reporting-obligations-covid>
- **CCSPSL:** <https://www.littler.com/publication-press/publication/california-expands-covid-19-supplemental-paid-sick-leave->
- **Workers' Comp.:** <https://www.littler.com/publication-press/publication/california-sb-1159-expands-presumption-workers-compensation-liability>
- **Hospital PPE:** <https://www.littler.com/publication-press/publication/governor-newsom-signs-law-requiring-california-hospitals-stockpile-ppe>
- **Work Sharing:** <https://www.littler.com/publication-press/publication/ab-1731-offers-much-needed-reforms-californias-work-sharing-program>

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- **CCPSL:** <https://www.littler.com/publication-press/publication/california-expands-covid-19-supplemental-paid-sick-leave>
- **Workers' Comp.:** <https://www.littler.com/publication-press/publication/california-sb-1159-expands-presumption-workers-compensation-liability>
- **Hospital PPE:** <https://www.littler.com/publication-press/publication/governor-newsom-signs-law-requiring-california-hospitals-stockpile-ppe>
- **Work Sharing:** <https://www.littler.com/publication-press/publication/ab-1731-offers-much-needed-reforms-californias-work-sharing-program>
- **COVID-19 Site:** <https://www.littler.com/covid-19>



**6Beds, Inc.**

*Advocating for Safe and Affordable Residential Care*



**Littler Wage &  
Hour Resource  
Center for  
Residential Care  
Facilities**

## Littler Wage & Hour Resource Center for Residential Care Facilities

- *Cost effective, state of the art, easy way to learn about compliance issues*
- *24-7 online access via Littler extranet portal with efficient legal updates*
- *Monitored by Littler Mendelson professionals and arranged by 6beds, Inc.*

One of the most difficult and time consuming jobs for a small business owners without a designated human resources and legal department is ensuring that personnel policies and procedures are always legally compliant. New Federal and California laws, and the court decisions and administrative regulations that interpret those laws, mandate continuous and timely updates to your personnel policies and procedures.

Littler's **Wage and Hour Resource Center for Residential Care Facilities in California** will address the ongoing issues facing 6Beds members and will be updated with relevant changes in the law and what it means to owners of residential care facilities.

- Updated downloadable version of the **WAGE AND HOUR GUIDE FOR RESIDENTIAL CARE FACILITIES IN CALIFORNIA** created by Littler attorneys
- Online access to the latest compliance regulations
- Online access to recorded training webinars and latest publications
- Environmentally friendly storage of important resources
- Fixed, one-time access fee for 6Beds members

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## This Guide Was Developed for 6Beds Members



- Help prepare 6Beds members for the increased examination of the wage and hour practices of residential care facilities
  - Increased Scrutiny on the Wage and Hour Practices of Residential Care Facilities
  - The interplay between state and federal law
  - Focus on federal sleep exemptions
  - California wage and hour law overview on selected topics
- Additional information about the Wage and Hour Guide is available on 6Beds' website  
<https://6beds.org/wage-hour-guide-for-rcf/>



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## Compliance Strategy


- Comply with the federal sleep exemptions to avoid potential liability under federal law.
- Comply with California state law regarding minimum wage, overtime, meal and rest periods, and recordkeeping to reduce risk of liability under state law.




**Littler** Home Wage & Hour Guide for Residential Care Facilities in C




Helping you keep pace with ever-changing wage and hour laws. For residential care employers, who frequently balance multiple worksites and ever-fluctuating labor needs, compliance can be a daunting task. Littler's Residential Care Toolkit helps residential care facilities remain in compliance with the ever-changing nature of wage and hour law.




Helping you keep pace with ever-changing wage and hour laws. Residential care facilities have been under increased scrutiny in recent years, particularly in the area of wage and hour compliance. To complicate matters, federal and state laws and regulations continue to evolve at breakneck speed. This portal provides detailed guidelines that keep pace with these legislative, regulatory, and judicial developments, and includes answers to Frequently Asked Questions as well as state-of-the-art sample forms and agreements to help residential care facilities remain in compliance with the ever-changing nature of wage and hour law.



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### News & Developments

 Latest Updates on COVID-19@

INSIGHT | OCTOBER 15, 2020  
Bouncing Back: A List of Statewide Return to Work Protocols

INSIGHT | OCTOBER 15, 2020  
This Won't Hurt a Bit: Employee Temperature and Health Screenings – A List of Statewide Orders

### Training & Events

#### Upcoming Events

WEBINAR | OCTOBER 19, 2020  
The Rite of Fall: Preparing Policy Handbooks for the Coming Year

WEBINAR | OCTOBER 20, 2020  
Arizona Virtual Employer

WEBINAR | OCTOBER 20, 2020  
2020 Virtual Benefits Symposium: Addressing Issues in the New Normal

# Littler Wage & Hour Resource Center for Residential Care Facilities

Home Wage & Hour Guide for Residential Care Facilities in California


 Search

Home  
Increased Scrutiny on the Wage and  
Hour Practices of Residential Care  
Facilities

- ▶ Payment for Sleep Time Under Federal Law
- ▶ California Wage and Hour Laws Appendices - Sample Forms & Policies

## Wage & Hour Guide For Residential Care Facilities In California



Alecia W. Winfield, Tammy D. McCutchen, and Ashley J. Brick

NOTE: This is not a do-it-yourself guide to resolving employment disputes or handling employment litigation or conducting a self-audit of your company's practices. This is also not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual differences which inevitably arise in any employment-related issue. While comprehensive, this guide is not all-inclusive but rather designed to highlight some of the key provisions under Federal and California law that apply to Residential Care Facility employers. Please contact your Littler Attorney for specific legal advice.

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Home  
Increased Scrutiny on the Wage and  
Hour Practices of Residential Care  
Facilities

- ▶ Payment for Sleep Time Under Federal Law
  - Shifts of Less Than 24 Hours
  - Shifts of 24 or More Hours
- ▶ California Wage and Hour Laws Appendices - Sample Forms & Policies

### Shifts of 24 or More Hours

DOL regulations allow employers to exclude some sleep time from hours worked for employees on duty for 24 hours or more, but only if: (1) the employer and employee enter into an agreement to exclude from hours worked a bona fide, regularly scheduled sleeping period of not more than 8 hours; (2) the employer provides adequate sleeping facilities; and (3) the employee can usually enjoy an uninterrupted night's sleep. [1]

#### 1. Agreement to Exclude a Regularly Scheduled Sleep Period

When an employee is required to be on duty for 24 hours or more, the employer may exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked if there is either an express or implied agreement between the employer and the employee to exclude such time. [2] No other off-duty time can be excluded.

Please refer to section IV(B)(5) below for the requirements that must be met in order to exclude meal periods, including but not limited to, allowing the employee to leave the premises during the meal period. Section I(B)(2) below further describes the requirements necessary to exclude a regularly scheduled 8 hour sleeping period from hours worked.

It is advisable for residential care facility employers to enter into a written sleep time agreement with each employee scheduled for shifts of 24 hours or more. The agreement should be signed by both a representative of the employer and the employee. Employers should also review the sleep time agreement on an annual basis to ensure that it reflects current sleep-time practices, and have each employee sign a new agreement every year.

#### 2. Adequate Sleeping Facilities

Generally, a sleeping facility will be considered "adequate" if it provides a favorable environment that would enable sleep to occur and provides reasonable assurance that the employee will be rested and alert when his or her on-duty time begins. [3] Although what constitutes adequate sleeping facilities "depends on the facts and circumstances of a particular living arrangement, an employer will have provided 'adequate sleeping facilities' if the employee has access to basic sleeping amenities, such as a bed and linens, reasonable standards of comfort, and basic bathroom and kitchen facilities (which may be shared)." [4] One court noted that "Adequate" sleeping facilities may require more than a chair in a corner of an office, but may also be less than a home-like atmosphere. [5]

Courts have found the following sleeping facilities "adequate" for the purpose of allowing employers to exempt sleep time from employees on duty for 24 hours or more: (1) a private staff room for employees for sleeping that was separate from residents; [6] (2) sleeping quarters with beds, dressers, lamps, nightstands, and fresh linens where employees were either given separate bedrooms or where two employees shared one large bedroom with two beds; [7] and (3) an employee sleeping room with a sufficient number of cots so that each employee on duty has an individual cot, linens and blankets. [8]

On the other hand, providing an employee only a couch or sofa bed in a common area or in a resident's room will probably not be deemed adequate. [9]

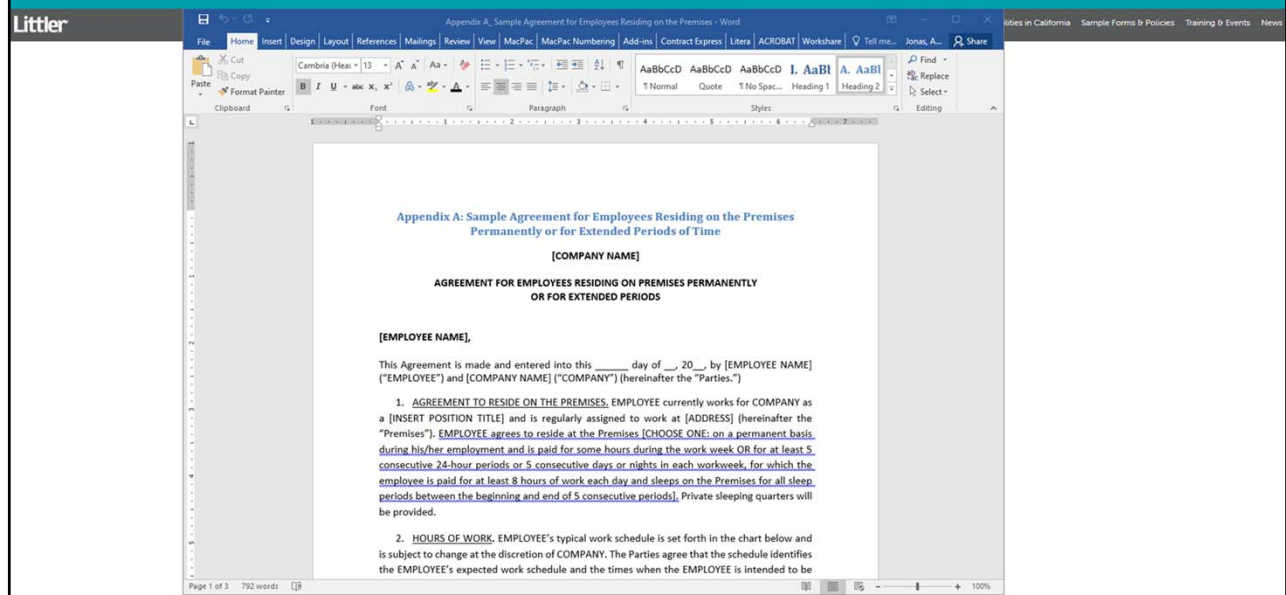
In assessing the adequacy of sleeping facilities, courts have relied heavily on whether employees ever complained about the sleeping facilities prior to the commencement of litigation. [10]

#### 3. Meeting the "Usually Enjoys an Uninterrupted Night's Sleep" Standard

# Littler Wage & Hour Resource Center for Residential Care Facilities

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## Littler Wage & Hour Resource Center for Residential Care Facilities



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## Applying Federal Sleep Exemptions

### Excluding Sleep Time Under Federal Law

- Live-ins (29 CFR 785.23)
- Shifts of 24 Hours or More (29 CFR 785.22)
- Certain relief workers
  - Up to 8 hours of a scheduled sleep period may be excluded from hours worked even if the employee is required to remain on premises





## Live-in Employees

### Live-in Employees

- Reside on premises permanently or for extended periods of time
- Private quarters in a homelike environment for sleeping
- A reasonable agreement
- Enjoying an uninterrupted night's sleep
- Payment for all on-duty time





## Live-in Employees

### *Who qualifies as a live-in?*

- Employees permanently residing on the premises 24/7 with no other home.
- Employees who reside on the premises for an extended period of time
  - Works and sleeps on premises for five 24-hour periods in each workweek (120 hours) and the employee is paid for at least 8 hours of work in each 24 hour period
  - Works and sleeps on premises for at least 5 consecutive days or nights in each workweek and the employee is paid for at least 8 hours of work each day



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## Live-in Employees

### *What is an extended stay schedule?*

S	M	T	W	TH	F	SAT
Off Duty	Off Duty	Employee scheduled 7am→7am	Employee scheduled 7am→7am	Employee scheduled 7am→7am	Employee scheduled 7am→7am	Employee scheduled 7am→7am

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## Live-in Employees *Private Quarters Requirement*

- Provide private quarters separate from the residents and other staff members
- Home like environment
  - Bed, chair, lamp, dresser or closet where caregiver can leave belonging when on and off duty
  - Access to a private bathroom
  - Couch/sofa bed in a common area or a resident's room is NOT sufficient
  - Access to facilities for cooking and eating and a space for recreation, which may be shared
- Sleep time cannot be excluded from hours worked under 29 CFR 785.23 if staff members are required to share a bedroom
  - DOL allows for consideration if room is shared by caregiver's spouse or domestic partner



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## Live-in Employees *Reasonable Agreement*

- Should set forth the hours the employee will be expected to be on-duty and off-duty.
- Recommend including a daily schedule of work time, meal breaks, sleep period and other off-duty time



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## Live-in Employees

### *Reasonable Agreement*

- Agreement should be objectively reasonable
- Consider whether off-duty time actually provides an opportunity for the employee to engage in private pursuits.
- Must not be a unilateral decision by an employer



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## Live-in Employees

### *Enjoying an Uninterrupted Night's Sleep*

- Must be able to get at least 5 hours of sleep during the 8-hour sleep period
- 5 hours do not have to be consecutive
- If the employee engages in work during the sleep period, the work time must be paid and counts towards overtime/double-time.
- If the employee does not get at least 5 hours of sleep, the entire 8-hour sleep period must be compensated
- If the employee chooses to use any part of his or her sleeping period to engage in other private pursuits instead of sleeping, the employee will not need to be paid for this time.



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## Live-in Employees *On-Duty and Off-Duty Time*

- On-duty hours requirement
  - No minimum number of on-duty hours for employees who permanently reside on the premises, however, to exclude sleep time the employee must be “paid for some other hours” during the work week
    - DOL Field Bulletin No. 2016-1: Excluded sleep time must be during normal sleeping hours (*i.e.*, overnight rather than during the daytime)
    - Reporting time pay could apply
  - Extended stay employees must be on duty and paid for at least 8 hours each workday
  - Extended stay employees must have worked at least 8 hours before the exclusion of sleep time is permissible



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## Live-in Employees *On-Duty and Off-Duty Time*

- Employees must be paid for all on-duty hours
  - Includes all hours the employee is required to be on the premises except for the sleep period
- No requirement to pay for off-duty time if the employee is free to leave the premises
  - If off-duty time is interrupted by work, the employee must be paid for this time
- Except for the 8 hour sleep period, employees must be paid for all other time they are required to remain on the premises
  - Even if the employee is merely “on-call” and can engage in personal activities at work like making phone calls, watching TV, browsing the internet, etc.

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## Relief Workers

### Relief Workers *Qualify for Sleep Exemption if:*

- Relieving a full-time employee
  - The full time employee and relief employee may not be on duty for more than a combined total of 7 days and 7 nights in each workweek
  - The relief employee cannot work at the same time as the employee he/she is relieving for more than 1 hour a day
- On-duty and compensated for at least 8 hours in each 24 hour working period
  - May need to adjust where an employee is relieving a permanently residing employee, who does not work 8 hours
- Resides on premises for 1-3 nights
- Sleeps on premises during each night of the relief period



## Relief Workers *Qualify for Sleep Exemption if:*

- Given private quarters for sleeping
- Reasonable agreement to exclude sleep time is reached in advance
- Must be able to sleep at least 5 hours during their 8 hour sleep period
- Paid for all time on-duty, for sleep interruptions and any time called back to duty



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Employees On  
Duty For 24  
Hours  
Or More

## On Duty for 24 hours or more *Who qualifies?*

- Employee on duty for 24 hours or more and sleeps on premises
- Examples:
  - Does not permanently reside on the premises
  - Works and sleeps on the premises for fewer than 5 consecutive days
  - Works and sleeps on premises for 5 consecutive days but shares a room with another employee (not provided private quarters)
- Employees who do not remain on premises for at least 24 hours do not qualify for a sleep exemption.



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## On Duty for 24 hours or more *Requirements*

- Agreement to exclude a regularly scheduled sleep period (written agreement strongly recommended)
- Adequate sleeping facilities are provided
  - Favorable environment that enables sleep to occur and provides employee with basic sleeping amenities, such as a bed and linens, reasonable standards of comfort (*e.g.*, private staff room), and basic bathroom and kitchen facilities, which may be shared
  - Can usually enjoy an uninterrupted night's sleep
  - Significant interruptions may result in loss of the exemption

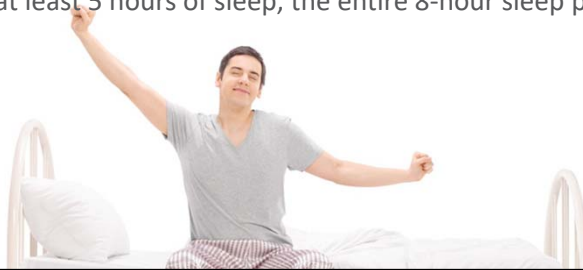


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## On Duty for 24 hours or more *Requirements*

- Must be able to get at least 5 hours of sleep during the 8-hour sleep period
- 5 hours do not have to be consecutive on individuals nights (22 CFR 785.22(b))
  - However, if less than half of the time, the employee is unable to get 5 consecutive hours of sleep, the exemption may be lost as the employee must “usually enjoy” an uninterrupted night’s sleep (29 CFR 785.22(a))
- If the employee engages in work during the sleep period, the work time must be paid and counts towards overtime/double-time
- If the employee does not get at least 5 hours of sleep, the entire 8-hour sleep period must be compensated



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## On Duty for 24 hours or more *What may be excluded from hours worked?*

- A regularly scheduled sleeping period of not more than 8 hours
- *Bona fide* meal periods
- No other off duty time can be excluded



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## Recap: >24 hours vs. Live-In

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## Exclusion of Sleep Time from Hours Worked for Live In and $\geq 24$ hour Caregivers

	Live-in employee		Shifts of 24 hours or more	Shifts of fewer than 24 hours
	Extended periods of time	Permanent		
Requirements for excluding an employee's sleep time from hours worked	<ul style="list-style-type: none"> <li>Reasonable agreement to exclude sleep time</li> <li>Employer must provide private quarters in a homelike environment</li> </ul>		<ul style="list-style-type: none"> <li>Employer provides adequate sleeping facilities</li> <li>Employee can usually enjoy an uninterrupted night's sleep (5 consecutive hours)</li> <li>Express or implied agreement to exclude sleep time</li> </ul>	Sleep time may not be excluded
Maximum number of hours that can be excluded	Up to 8 hours per night as long as the employee is paid for at least 8 hours during the 24-hour period	Up to 8 hours per night as long as the employee is paid for some other hours during the workweek	Up to 8 hours, in a fixed period, in each 24-hour shift	Sleep time may not be excluded
Limitations on exclusion on a particular night	<ul style="list-style-type: none"> <li>Any interruption to sleep time must be paid</li> <li>If during any night the employee does not get reasonable periods of uninterrupted sleep totaling at least 5 hours, the employer may not exclude any sleep time</li> </ul>			

**FIELD ASSISTANCE BULLETIN NO. 2016-1**  
U.S. Department of Labor  
April 25, 2016

<https://www.dol.gov/agencies/whd/field-assistance-bulletins/2016-1>

## Time Sheet – *Key Categories*

- Start work and end work
- Other off duty time start and end work times
- Start meal and end meal for all meal periods taken
- Start sleep and end sleep
- Interruptions for sleep (time)
- 5 hours of uninterrupted sleep (Y/N)
- Time of other off duty time
- Total hours worked
- Explanation for other paid time
- Employee certification

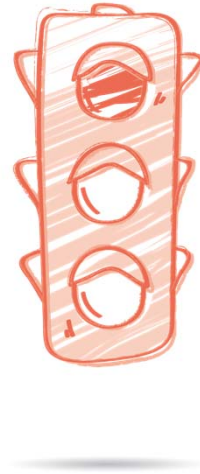


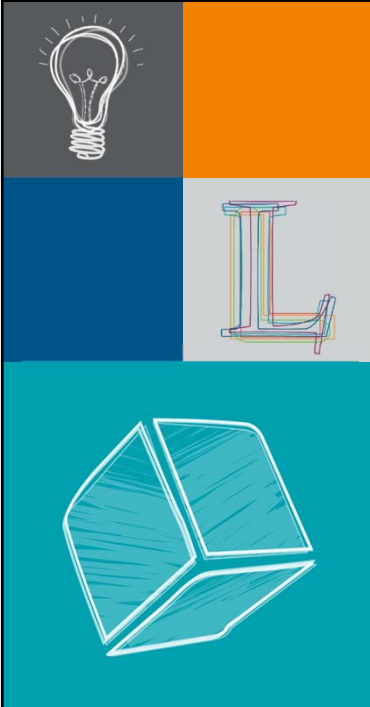
Prohibiting Off-the-Clock Work

## Recognizing and Prohibiting Off-the-Clock Work

### Examples of prohibited off-the-clock work include but are not limited to:

- Performing work-related activities before a non-exempt employee has started recording work time or after an employee has stopped recording work time;
- Performing work during the employee's meal period and not reporting the missed or interrupted meal period;
- Failing to report accurate travel times for time spent traveling between different residential care facilities; and
- Sending or responding to work-related e-mails or making or responding to phone calls without reporting the time worked.





# Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.

