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By Lauren J. Peterson

Wage Theft in Licensed Residential Care Facilities for the Elderly



In the residential care industry, the concern over the issue of wage theft extends beyond simple enforcement of wage and hour laws. Making sure that caregivers are properly compensated and not overworked is essential to preserve their ability to provide the best possible care in residential care facilities for the elderly.

CAREGIVERS WORKING IN RESIDENTIAL CARE facilities for the elderly (RCFEs) provide an important service to elderly individuals and their families.

Providing adequate care in a facility setting, where there are usually multiple residents with serious health conditions, is a demanding job.

RCFE caregivers assist residents with activities that able-bodied individuals may take for granted, such as brushing teeth, using the restroom, changing clothes, and eating. To meet the residents' needs, caregivers often work long hours, sometimes up to 24 hours a day, but in spite of the valuable services that facility caregivers provide, many facility owners grossly underpay their workers.¹

Wage theft in any industry is an important social concern. In the residential care industry, this concern extends beyond simple enforcement of wage and hour laws. Insuring that caregivers are properly compensated and not overworked is essential to preserve their ability to provide the best possible care.

California law protects caregivers working in RCFEs from wage theft. RCFE caregivers are entitled to minimum wage and overtime compensation as well as meal and rest breaks. A failure to pay RCFE caregivers according to California law may result in substantial liability for RCFE employers, who are subject to harsh penalties,² fines and even criminal prosecution.³

Caregivers Are Entitled to Minimum Wage, Overtime and Double Time Compensation

All caregivers working in RCFEs are entitled to minimum wage and most are also entitled to overtime compensation pursuant to Industrial Welfare Commission Wage Order 5-2001.⁴ Although the Industrial Welfare Commission was defunded in 2004, its Wage Orders are still in effect.⁵

Wage Order 5 applies to the public housekeeping industry, which is defined to include "rest homes, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care."⁶ Caregivers working in private homes, however, are subject to Wage Order 15 and California's Domestic Worker Bill of Rights.⁷

Wage Order 5 is explicit that "every employer shall pay to each employee wages not less than minimum wage."⁸ There is no legally recognized exemption to this minimum wage mandate for caregivers working in RCFEs.

With some exceptions, caregivers working in RCFEs must be paid overtime compensation for all hours worked

in excess of eight per day or 40 per week, and double time compensation for all hours worked in excess of 12 per day.⁹ One exemption from this requirement applies to "personal attendants" employed by non-profit organizations. To be exempt, a personal attendant's primary duties must be to "supervise, feed or dress a ...person who by reason of advanced age, physical disability or mental deficiency needs supervision."¹⁰

Although most facility caregivers meet these requirements, Wage Order 5 expressly limits this exemption to employees working for non-profits.¹¹ Caregivers working at for-profit RCFEs cannot qualify as personal attendants and must be paid according to California's overtime rules.

Wage Order 5 also contains special overtime rules for resident managers of RCFEs who work 40 or fewer hours in a workweek, except on an emergency basis.¹² However, the resident manager rules only eliminate the daily overtime requirement, meaning that legitimate resident managers must be paid overtime for all hours worked in excess of 40 in a week.¹³

Caregivers working in RCFEs who do not qualify for the exemptions described in Wage Order 5 must be paid overtime and double time compensation for all applicable hours worked. Many RCFE employers pay caregivers a salary, regardless of the actual number of hours worked. However, paying an employee in any industry a salary does not automatically exempt that employee from minimum wage or overtime. Many times the salary paid is far less than the legally required minimum wage.

Moreover, paying a non-exempt employee a salary only compensates that employee for non-overtime hours, notwithstanding a private agreement to the contrary.¹⁴ As such, paying a salary to a non-exempt RCFE caregiver who works more than eight hours a day or 40 hours a week that caregiver has not been paid anything for hours worked in excess of eight a day or 40 per week. This is true even if the agreed upon salary equals or is greater than the minimum wage and overtime wage for all hours worked.

For example, Tony is a live-in caregiver who works in a for-profit RCFE. Tony receives \$100 each day regardless of the quality or quantity of work performed. He lives in the facility and is required to be physically present 24 hours every day, Monday through Friday. The \$100 daily rate is a salary because it is a "fixed rate of pay as distinguished from an hourly wage."¹⁵ In this situation, Tony's salary equates to about \$4.17 per hour for 24 hours of work, far less than the California minimum wage.¹⁶ Further, because that salary does



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not compensate Tony for any overtime hours worked, Tony receives no compensation for 16 hours of work each day.

Of the 16 hours Tony works without compensation each work day, four of those hours must be paid at the overtime rate, which is one and one-half times Tony's regular rate of pay.¹⁷ The other 12 unpaid hours must be paid at Tony's double time rate, which is two times Tony's regular rate of pay.¹⁸

This leads to the question of how to calculate a non-exempt employee's regular rate of pay when the employee receives a daily salary. When an employee receives a salary, the regular rate of pay is calculated pursuant to Labor Code §515(d)(1), which states, "[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee's regular hourly rate shall be 1/40th of the employee's weekly salary."¹⁹

In Tony's case, his weekly salary is calculated by multiplying \$100 per day by five days worked a week. The result is a weekly salary of \$500, which is then divided by 40 hours, to get Tony's regular rate of \$12.50 per hour. Tony's overtime rate is \$18.75 per hour and his double time rate is \$25 per hour.

So, if Tony works 24 hours each weekday, he is entitled to a total of \$75 each workday in unpaid overtime—four overtime hours x \$18.75 per hour. Additionally, Tony's employer owes him double time compensation for 12 double time hours, payable at the double time rate of \$25 per hour. Based on these numbers, Tony's employer would have underpaid Tony a total of \$375 each day worked. This amounts to \$1,875 owed each week—\$375 x 5 days worked a week—and \$97,500 owed in unpaid wages each year, or \$1,875 x 52 weeks a year.

The above example demonstrates the staggering liability that results when RCFE employers improperly pay an RCFE caregiver a daily salary. With some exceptions, RCFE caregivers must also be provided uninterrupted meal and rest breaks each workday.²⁰ If proper meal and rest breaks are not provided, the RCFE employer must pay the employee one hour of pay at the employee's regular rate of pay for up to one meal and one rest break missed a day.²¹

In addition to the unpaid wages owed, caregivers are entitled to interest on all amounts due, with employers also liable for attorneys' fees and costs in enforcing the claims pursuant to Labor Code §1194, as well as the additional penalties discussed below.²²

Independent Contractor Myth

California's minimum wage and overtime laws only apply to employees, not independent contractors. To skirt these laws, and sometimes for other reasons, RCFE employers often misclassify caregivers as independent contractors, with the state frequently imposing monetary penalties on employers who do so.²³

Whether the misclassification is intentional or by error, it is nearly impossible under California law for RCFE employers to establish that the caregivers that work for them are legitimate independent contractors.

First, California law presumes that one who performs services for another is an employee.²⁴ The burden of proof is on the putative employer to establish a bona fide independent contractor relationship. Additionally, in the wage and hour context, California law provides several methods for an employee to establish employment over independent contractor status. Wage Order 5 defines the term "employ" as "to engage, suffer, or permit to work."²⁵ Wage Order 5 also defines the term "employer" as "any person...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person."²⁶

The California Supreme Court, in *Martinez v. Combs*,²⁷ held that the wage orders' definitions of "employ" and "employer" create three alternative tests to establish employment, any one of which is sufficient on its own.

The court held, "To employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, or (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship."²⁸

An employee need only establish employment under one of these three tests while the employer will bear the burden of negating all three. Under California's common law employment test, which is described in *S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*,²⁹ the most important factor in evaluating a relationship is "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired."³⁰

Control is the overriding factor expressed in Wage Order 5, *Martinez*, and *Borello*. RCFE employers are required by law to heavily control the hours, working conditions and manner and means of an RCFE caregiver's work. RCFEs must be licensed³¹ and are highly regulated under the Health and Safety Code and Title 22 of the California Code of Regulations. These regulations affirmatively require RCFE licensees to supervise the operation of the RCFE and establish policies ensuring that the RCFE complies with regulatory standards.³²

Furthermore, RCFE employers must hire and train facility staff, and terminate the employment of staff that does not perform satisfactorily.³³ The training that RCFE employers are required to provide demonstrates that they must control their caregivers' working conditions and the manner in which they perform their work to prevent elder abuse and ensure the health and safety of the residents.³⁴

The obligation to terminate caregivers from their employment is the ultimate form of control over a caregiver's working conditions. From *Ayala v. Antelope Valley Newspapers, Inc.*: "Perhaps the strongest evidence of the right to control

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is whether the hirer can discharge the worker without cause, because the power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities."³⁵

RCFE employers also control their caregivers' work hours because they are required to ensure 24-hour supervision of the residents in their care.³⁶

The bottom line is that Title 22 and the Health and Safety Code require the RCFE licensee to maintain a high level of control over their caregivers that makes it virtually impossible for RCFE employers to classify their caregivers as true independent contractors under any standard.

Additionally, the mere fact that an employer issues the caregiver an IRS 1099 form rather than a W-2 form is not, in and of itself, determinative of independent contractor status.³⁷

In some instances, RCFE owners hire undocumented workers and argue that undocumented status precludes employment status. That position is simply incorrect. California Labor Code §1171.5 prohibits RCFE employers from using a caregiver's immigration status as a defense to claims for unpaid wages. In enacting §1171.5, the California legislature made a clear statement: "All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state."³⁸ In effect, all employees in California are entitled to protection from wage theft, regardless of their immigration status.

Enforcement of Wage Theft Claims


RCFE caregivers who have been the victims of wage theft may enforce their right to unpaid wages either by filing a claim with the California Labor Commissioner's office or by filing a lawsuit. In either venue, an RCFE caregiver can seek to recover all unpaid wages, as well as premiums for meal and rest period violations.³⁹ The RCFE caregiver is also entitled to interest on all amounts due.⁴⁰

Additionally, victims of wage theft who have been terminated or resigned from their employment may be entitled to a waiting time penalty pursuant to Labor Code §203 for the employer's willful failure to pay all wages due at the time the caregiver's employment ended.⁴¹ This penalty is calculated at the caregivers' daily rate of pay, for up to thirty days.⁴²

Further, if an RCFE caregiver has not been paid at least minimum wage for all hours worked, the caregiver may be entitled to liquidated damages in an amount equal to all minimum wages owed pursuant to Labor Code §1194.2, plus interest.⁴³

If an RCFE caregiver elects to file a lawsuit, he or she is also entitled to recover attorneys' fees and costs⁴⁴ and may seek additional penalties pursuant to Labor Code §226 in an amount up to \$4,000 if the RCFE employer has failed to provide

pay stubs that comply with the numerous requirements of that statute.⁴⁵ However, neither of these remedies are available if the RCFE caregiver proceeds through the California Labor Commissioner.

From a business perspective, because of the substantial risks RCFE employers face in defending wage theft actions, it is generally more expensive for employers to violate wage and hour laws than it is to pay workers required overtime and minimum wages. More importantly, RCFE employers must ensure that RCFE caregivers are properly compensated for their hard work so that they can provide the best possible care in residential facilities. 

¹ The California Labor Commissioner's Office has issued several press releases documenting awards issued by the Labor Commissioner's office to RCFE caregivers ranging from \$443,000 to over \$3,000,000. These awards tend to indicate an industry practice of substantially underpaying workers. See DLSE News Release Nos. 13-25, 2014-101, 2015-74, 2016-32, and 2016-96.

² Cal. Labor Code §§203 and 1194.2.

³ Cal. Labor Code §1199.

⁴ IWC Wage Order 5 is codified at 8 Cal. Code Regs. §11050.

⁵ *Johnson v. Arvin-Edison Water Storage Dist.*, 174 Cal. App. 4th 729, 735 (2009) ("Although the IWC was defunded effective July 1, 2004, its wage orders remain in effect.")

⁶ 8 Cal. Code Regs. §11050, subdiv. 2(P)(4) (emphasis added).

⁷ The Domestic Worker Bill of Rights is codified at Cal. Labor Code §1450, et seq.

⁸ *Id.* §11050, subdiv. 4(A) (emphasis added).

⁹ *Id.* §11050, subdiv. 3(A)(1).

¹⁰ *Id.* §11050, subdiv. 2(N).

¹¹ *Id.*

¹² 8 Cal. Code Regs. §11050, subdiv. 3(E).

¹³ *Id.*

¹⁴ Cal. Labor Code §515(d)(2).

¹⁵ *Negri v. Koning & Associates*, 216 Cal.App.4th 392, 397 (2013); "A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage."

¹⁶ Under IWC Wage Order MW-2017, beginning January 1, 2017, the California minimum wage for employers of 25 or fewer employees is \$10.00 per hour. The minimum wage for employers of 26 or more employees is \$10.50 per hour.

¹⁷ 8 Cal. Code Regs. §11050, subdiv. 3(A); Cal. Labor Code §510(a).

¹⁸ *Id.*

¹⁹ Cal. Labor Code §515(d)(1).

²⁰ 8 Cal. Code Regs. §11050, subdiv. 11(A) & 12(A); Cal. Labor Code §226.7.

²¹ *Id.* §11050, subdiv. 11(B) & 12(B); Cal. Labor Code §226.7.

²² Cal. Labor Code §1194.

²³ Cal. Labor Code §226.8.

²⁴ *Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) ("[t]he rule ... is that the fact that one is performing work and labor for another is prima facie evidence of employment and such a person is presumed to be a servant in the absence of evidence to the contrary"); See also Cal. Labor Code §3357.

²⁵ 8 Cal. Code Regs. §11050, subdiv. 2(E).

²⁶ *Id.* §11050, subdiv. 2(H).

²⁷ *Martinez v. Combs*, 49 Cal. 4th 35 (2010).

²⁸ *Id.* at 64.

²⁹ *S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*, 48 Cal.3d 341 (1989).

³⁰ *Id.* at 350 (internal quotations omitted).

³¹ Cal. Health & Safety Code §§1569.10, 1569.44, 1569.45.

³² 22 Cal. Code Regs. §87205(a).

³³ 22 Cal. Code Regs. §87405(h)(4).

³⁴ 22 Cal. Code Regs. §87413(a)(2).

³⁵ *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014) (internal quotations omitted).

³⁶ Cal. Health & Safety Code §1569.618(b); 22 Cal. Code Regs. §87405(h)(3).

³⁷ *Toyota Motor Sales v. Superior Court*, 220 Cal.App.3d 864, 877 (1990).

³⁸ Cal. Labor Code §1171.5(a).

³⁹ Cal. Labor Code §§98, 1197, 1194, and 226.7.

⁴⁰ Cal. Labor Code §1194.

⁴¹ Cal. Labor Code §203.

⁴² *Id.*

⁴³ Cal. Labor Code §1194.2.

⁴⁴ Cal. Labor Code §1194.

⁴⁵ Cal. Labor Code §226.