



Latest Legal Developments Impacting the Home Care Industry

April 2022



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BY THE NUMBERS



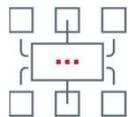
900+
attorneys nationwide

45+
years of client service




170
services/industries

7
core practice areas




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



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
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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

21
offices with full service capabilities



Agenda

- Latest POSH Resources
- Federal Vaccination Mandates
- OSHA Healthcare ETS and the General Duty Clause
- 2022 Federal and State Laws
- Uptick in DOL Investigations and Best Practices
- Questions





Polsinelli Online Solutions for Home Care (POSH)

POSH – Included with Your Subscription

Base Package + COVID-19 Response Package +
Vaccine Mandate Map + State Premium Resources +
State Licensing Guides + HIPAA Compliance Package

HR Documents and Forms Module



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Business Formation 	Licensing & Regulatory Support 	HR Documents, Forms & Templates
Training, Recruitment & Retention 	Our Partners 	COVID-19 Resources



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HR Documents, Forms & Templates



General Employment Templates & Resources

Documents that meet federal requirements relating to the phase of employment before an offer letter is signed. For specific state compliant language, see our State Specific Guidance Module.



State Specific Employment Templates & Resources

Documents that meet state requirements relating to the phase of employment before an offer letter is signed. This includes interviewing, working with recruiters and offering a candidate a position. These documents are custom tailored to the States to which you subscribe.



International Employment Templates & Resources

Documents relating to the phase of employment before an offer letter is signed for Australian and Canadian jurisdictions.

Recent News & Upcoming Events

- Past, Present and Future: What's Happening with Illinois' and Other Biometric Privacy Laws - May 25, 2021**
Despite its passage in 2008, class action litigation alleging violations of the Illinois Biometric Information Privacy Act (BIPA) has increased significantly in recent years and settlement figures can ...
- New TPA Law Governing Workers Compensation in Washington State - May 6, 2021**
Washington has recently adopted legislation (Substitute House Bill 2409 that established Revised Code of Washington 51.14.179) that will impose new licensing and other regulatory requirements on workers ...

[See All General Content](#)

[Request Assistance](#)

[My Proprietary Files](#)



State-Specific Premium Resources

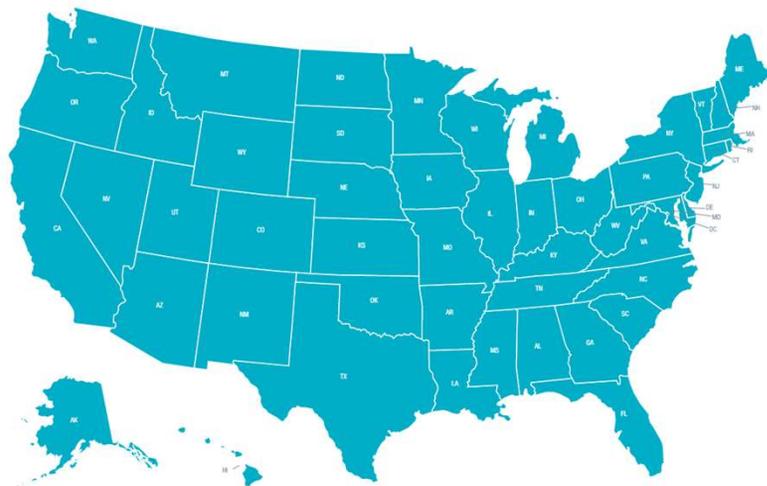
State Specific Materials and Information



About | Our Services - | Our Resources - | Request Demo | Contact Us



Click on a state to see the relevant state documents.



Options within each state (base)



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California Specific Employment Resources & Templates

General State Materials



Arbitration

Arbitration agreements are typically executed during the Onboarding phase of the Employment Lifecycle. These have been called out separately here due to their high importance.

[Arbitration Documents](#)



Posters & Notices

Required Employment Posters & Notices.

[Posters & Notices](#)



State Employment Guide

Comprehensive guidance for the municipalities and local state jurisdictions.

[State Employment Guide](#)



Other State Resources

State materials and local association listings.

[Other State Resources](#)

[My Proprietary Files](#)

State-Specific Premium Resources

Premium State Materials



Pre-Hire

Documents relating to the phase of employment before an offer letter is signed. This includes interviewing, working with recruiters and offering a candidate a position.

[Pre-Hire Documents](#)



Onboarding

Documents relating to the employment phase where a candidate has accepted a job through their initial paperwork. This includes background screening, acknowledgments and policies related to workplace conduct and other items required to integrate a new employee.

[Onboarding Documents](#)



During Employment

Documents related to processes and procedures that are not associated with hiring, onboarding or termination. Documents relating to performance reviews, counseling and other administrative processes (reimbursement, time logs, etc.)

[During Employment Documents](#)



Termination

Documents relating to ending employment. Including severance agreements, separation notices and other items required to end employment and off-board a soon-to-be former employee.

[Termination Documents](#)



State Licensing Guide

Regulatory and employment guidance for Home Care. This content is coming soon.

[State Licensing Guide](#)



Policy & Procedure Manual

State Specific Guidance on Home Care related policies, procedures and licensing requirements.

[Policy and Procedure Manual](#)

Illinois Labor and Employment Guide

Illinois Labor and Employment Guide



This publication offers an overview of federal and state requirements for Illinois home-based care employers. Where applicable, municipal ordinances from the state's largest cities may be included, but only when pertaining to background checks, domestic worker bill of rights, local minimum wage, paid sick leave, or antidiscrimination provisions. Employers may find the information useful in understanding their compliance obligations. Employers must comply with both federal and state law. When a federal and state law address the same subject matter, the employer must generally comply with the law that is most beneficial to employees.

Illinois Labor and Employment Guide

PRE-HIRE

Statute / Regulation	Requirement
<p data-bbox="613 555 852 574">Salary History Inquiries</p> <p data-bbox="613 997 869 1052">820 Ill. Comp. Stat. §§ 112/10(b-5), 112/10(b-10), 112/10(b-15), 112/10(b-20).</p>	<p data-bbox="919 555 1478 646">Federal: There are no federal laws prohibiting prospective employers from asking prospective employees about their salary history at previous employers. Employers are advised to comply with state laws regulating salary history inquiries where applicable.</p> <p data-bbox="919 652 1478 945">Further, employers must be cautious in attempting to restrict prospective employees from discussing salary histories with current and prospective employees. While employers may restrict employees from discussing their salary in front of customers or while they are supposed to be working, employers may not entirely prohibit employees from discussing compensation and benefits. The National Labor Relations Act (NLRA) gives all employees the right to “engage in concerted activities,” including the right to discuss their terms and conditions of employment with each other. The NLRA also treats an employer’s denial or limitation of those employee rights as an unfair labor practice. Based upon the above, the National Labor Relations Board (NLRB) has taken the position that employers may not prohibit employees from discussing their pay and benefits, and that any attempts to do so violate the NLRA.</p> <p data-bbox="919 977 1289 997">Illinois: Employers of any size may not:</p> <ul data-bbox="953 1006 1478 1224" style="list-style-type: none"> <li data-bbox="953 1006 1478 1097">• screen job applicants based on their current or prior wages or salary histories, including benefits or other compensation, by requiring that the wage or salary history of an applicant satisfy minimum or maximum criteria; <li data-bbox="953 1101 1478 1224">• request or require a wage or salary history as a condition of being considered for employment, as a condition of being interviewed, as a condition of continuing to be considered for an offer of employment, or as a condition of an offer of employment or an offer of compensation, or as a condition of employment. <p data-bbox="919 1230 1478 1286">An employer also may not seek an applicant’s wage or salary history, including benefits or other compensation, from any current or former employer. This prohibition does not apply if:</p>

Polsinelli's COVID-19 Response Package*

- Caregiver and Client Forms:
 - Notice of Risk
 - Certifications of Lack of Exposure
 - Waiver of COVID-19 Risk
 - Authorization to Release Status to 3rd Parties
- Testing and Operational Protocols
- Vaccine Policies and Releases
 - Accommodation Procedures
 - Request for Religious Exemption or Accommodation
 - Vaccine Release Authorization for CA, CT & TX
 - Compliance Letter – CA & NJ
- Safety and Health Guide and Policy

*There are currently **50** federal and state documents available via this package. We are updating these materials frequently as the laws change.

COVID-19 Recommended Protocols



Sample State Licensing Guide

Personal Care Licensing Summary Saturday, July 3, 2021
1:02:21 PM

California

Summary of Scope	This Licensing Summary is a resource for current and prospective business owners who wish to understand the requirements for obtaining licensure for personal care services. This summary is intended to be inclusive of all requirements that are readily accessible and available. Requirements can change without notice. This Licensing Summary will be reviewed and updated regularly to provide the most up-to date information. This summary will not include any requirements related to Medicare, Medicaid services, or waiver programs. This summary is not intended to guide current and prospective business owners through every step of licensing, but to provide the necessary information for assistance with the process.
Agency(s)	Home Care Organization Agency California Department of Social Services (CDSS) Community Care Licensing Division Home Care Services Bureau
Key Contacts	Home Care Organization Agency California Department of Social Services (CDSS) Community Care Licensing Division Home Care Services Bureau 744 P Street MS 9-14-90 Sacramento, CA 95814 Phone: (877) 424-5778 Fax: (916) 651-5600 HCSB@dss.ca.gov
Agency Website	Home Care Organization Agency https://www.cdss.ca.gov/inforesources/community-care/home-care-services
License (Companion)	A companion care agency needs a Home Care Organization (HCO) license in California. The HCO is licensed by the California Department of Social Services. An HCO may provide companion, homemaker and personal care services. Please see the section "License (Personal Care)," in this guide, for more information on HCO personal care services. California law established the Home Care Services Consumer Protection Act (HCSCPA) which, as of January 2016, requires HCO's to be licensed, hire only workers who have passed a background check, hire only aides who have been registered, and have completed state specific training. Those registered home care aides that are employed by HCO's and provide non-medical home care services must list themselves with a state registry online. The Home Care Aide Registry provides individuals with the ability to locate a home care aide who has completed the criminal background check process administered by the California Department of Social Services. Companion or sitter services are nonmedical, supportive services that provide socialization, interaction, activities or assistance with daily living. Companion or

California

	sitter service does not include hands-on personal care. Homemaker services are nonmedical, supportive services that ensure a safe and healthy environment for a person in their home. These services include assistance with performing day to day household duties and might include cooking, household cleaning, laundry and other household chores but it does not include hands-on personal care. The link to the Home Care Aide Registry is found here: https://www.cdld.dss.ca.gov/hcsregistry/About.aspx
License (Personal Care)	A personal care agency also needs an HCO license in California. The HCO is licensed by the California Department of Social Services to provide non-medical care which includes companion, homemaker and personal care services. It cannot provide or arrange for skilled nursing services in the home. California law established the Home Care Services Consumer Protection Act (HCSCPA) which, as of January 2016, requires HCO's to be licensed, hire only workers who have passed a background check, hire only aides who have been registered and have completed state specific training. Those registered home care aides that are employed by HCO's and provide non-medical home care services must list themselves with a state registry online. The Home Care Aide Registry provides individuals with the ability to locate a home care aide who has completed the criminal background check process administered by the California Department of Social Services. Personal care services provide assistance with activities of daily living. These are non-medical services that are provided by an unlicensed caregiver and focus on assisting the client in living independently. Home care aides may provide non-medical home care services and assist clients with activities of daily living. These services can include, but are not limited to: <ol style="list-style-type: none"> 1. Helping a client bathe, dress, or use the restroom; 2. Driving the client to appointments or to run errands; 3. Assisting the clients with exercising, transferring, ambulating, and/or positioning; 4. Preparing meals and assisting the client with eating; 5. Housekeeping duties and laundry; and, 6. Keeping a client company and assisting with telephone calls. The link to the Home Care Aide Registry is found here https://www.cdld.dss.ca.gov/hcsregistry/About.aspx
Certificate of Need	No
Moratorium	No
License Costs	HCO License The initial licensure cost for the HCO License is currently \$5,603. You are required to have: an employee dishonesty bond with a minimum limit of ten thousand dollars (\$10,000); a general and professional liability insurance policy in the amount of at

Other POSH Packages for Franchisees

Package	Description	Price*
Business Formation Services	Corporate or LLC business formation for franchisees	\$1,000 formation plus hourly rate for complex structures
State Policy and Procedures Manuals	Comprehensive, streamlined state-specific policy and procedure manuals for personal and skilled Home Care hosted on Publisher.	Policy and Procedure Manual (per manual) \$700 first year \$180 annual renewal

Policy and Procedure Manual

SECTION ONE *Administration*

	Policy No.
Organization and Administration	
Governing Body	1-001
Executive Director/Administrator*	1-002
Certificate of Insurance	1-003
Nondiscrimination Policy and Grievance Process	1-004
Regulatory Compliance	1-005
Annual Operating Budget	1-006
Human Resources	
Categories and Qualifications of Personnel	1-007
Selecting and Hiring Personnel	1-008
Personnel Licensure, Certification and Registration	1-009
Personnel Record Contents	1-010
Personnel Orientation	1-011
Orientation of Unlicensed Assistive Personnel to Assigned Responsibilities	1-012
Inservice Training and Personnel Development	1-013
Personal Care Assistant Training	1-014
Homemaker/Companion Training and Supervision	1-015
Core Competency	1-016
Information Management	
Safeguarding and Retrieval of the Client Record	1-017
Retention of Records	1-018

SECTION TWO *Operations and Provision of Care*

	Policy No.
Client Services	
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Informed Consent and Refusal of Care	2-002
Complaint and Grievance Process	2-003
Scope and Listing of Services*	2-004
Plan of Care	2-005
Client Care Evaluations	2-006
Office Services	
Intake and Referral Process	2-007
Admission Criteria and Process	2-008
Continuity of Care	2-009
Transfer, Referral, Discharge Criteria and Process	2-010
Client Record Contents	2-011
Client Financial Responsibility	2-012

SECTION THREE *Quality Oversight/Risk Management*

	Policy No.
Corporate Compliance	
Referral Disclosure	3-001
Annual Organization Evaluation	3-002
Corporate Compliance Plan	3-003
Client Satisfaction Survey Program	3-004
Written Agreements for Contracted Services	3-005
Responsibilities and Supervision of Services	3-006
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Occupational Exposure Information and Training	3-021
Infectious Disease Records	3-022



Federal Vaccination Mandates

Mandates



Healthcare Emergency Temporary Standard (June 21, 2021) [ALL BUT THE COVID-19 LOG AND REPORTING REQUIREMENTS EXPIRED DECEMBER 21]



Omnibus Covid-19 Health Care Staff Vaccination Interim Final Rule (November 5, 2021)



COVID-19 Vaccination and Testing Emergency Temporary Standard (November 5, 2021)

Other State and Local Government Laws, Orders

CMS Mandate

- 11.5.21: CMS issued a vaccination mandate that impacts roughly 1 million employees nationwide
 - Rule was challenged in the courts
 - For a period the rule was not in effect because of these challenges
- 1.13.22: SCOTUS ruled (5-4) that the CMS mandate should remain in force pending further litigation
 - Litigation may take months to unfold
- NOTE:
 - There are exemptions available for caregivers based upon religious, medical, or delay reasons (documents are available on POSH to administer those exemptions!)
 - There is no ongoing testing requirement for those who receive exemptions

Does the CMS Apply to My Agency?

- Staff of Medicare-certified home health agencies are covered.
- Medicaid HCBS providers are not directly subject to the mandate if they only deliver those services.
 - If a provider delivers HCBS and home health or hospice services, then the CMS mandate may apply.
 - There may be other reasons an agency's employees would be considered staff of other covered facilities.



CMS Mandate

- What does this mean for my home care agency?
 - Your employees may be considered “staff” of a Medicare-certified Home Health Agency or Hospice if they care for a client who is also a patient of one of these providers – it doesn’t matter whether you have a contract with that HHA or Hospice
 - Similarly, if your caregivers are working in a nursing home, they may be considered “staff” of that nursing home – it doesn’t matter whether you have a contract with the facility or just the resident of that facility
 - Think of it as the Midas-touch rule
 - The good news, though, is you are not subject to survey or citation
 - BUT your potential partners may be cited if you send unvaccinated caregivers into these situations where they don’t have a medical or religious objection to the job
 - So it is likely they will ask about your employees’ vaccination status
 - Make sure your employees have signed authorizations before providing this to them!

CMS – Interplay with State Law?



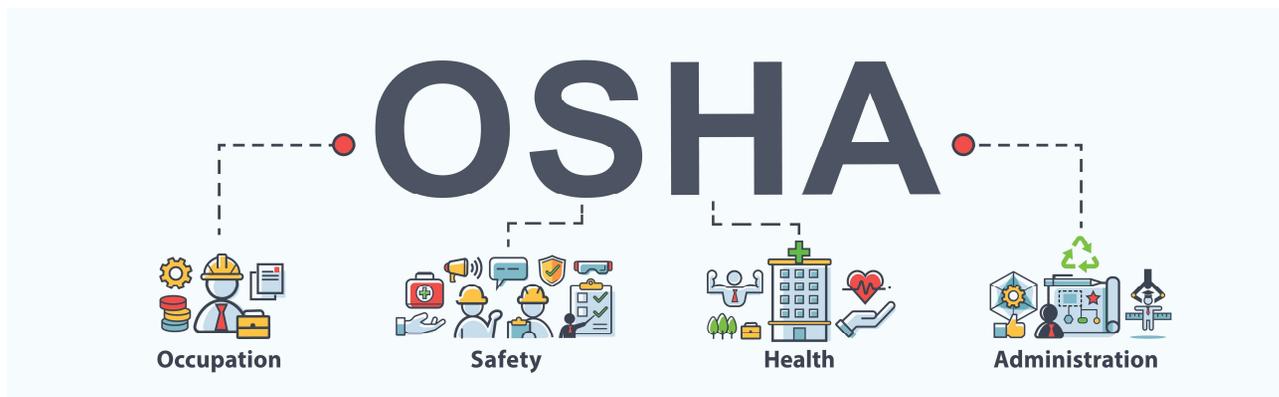
- CMS states the Mandate preempts any inconsistent state law
 - State laws that prohibit employers from requiring vaccination
 - State laws that would limit the types of exemptions available under state law
- The Mandate will be unlikely to preempt state law with more requirements where employers/facilities can comply with both
 - State laws that require testing of unvaccinated staff



OSHA General Duty Clause

Section 5(a)(1) OSH Act Basics

- Requires that each employer furnish to each of its employees a workplace that is free from recognized hazards that are causing or likely to cause death to a serious physical harm.
- The general duty provision can be used by OSHA only where there is no standard that applies to the hazard and the employer's own employees are exposed to the alleged hazard.

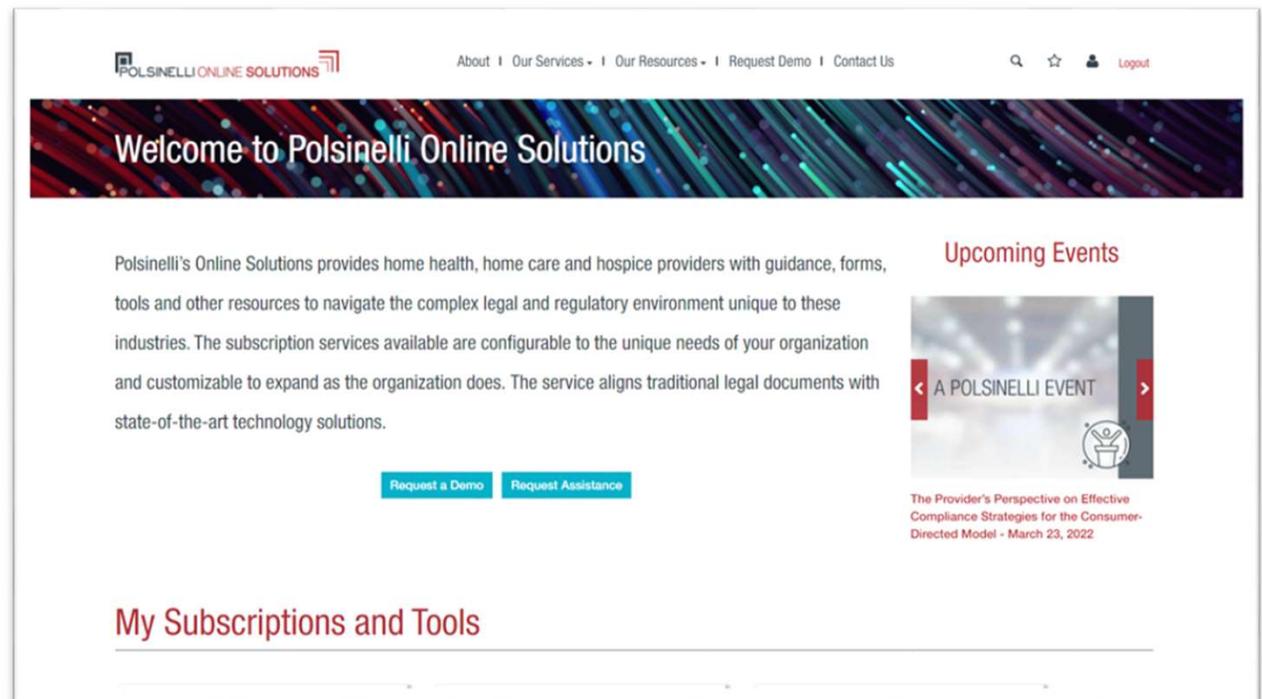


General Duty Clause Violation

- States that operate OSHA-approved workplace safety and health programs, have adopted this, or an equally effective, provision.
 - Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming
- OSHA may prove a general duty clause violation when:
 - 1) The employer failed to keep the workplace free of a hazard to which its employees were exposed.
 - 2) The hazard was recognized by the employer.
 - 3) The hazard was causing, or was likely to cause, death or serious physical harm (serious violation).
 - 4) There was a feasible and useful method to correct the hazard.

How Can Your Agency Comply with OSHA's General Duties Clause?

- 2.27.21: OSHA announced it will accept compliance with the terms of the Healthcare ETS as satisfying employer's relation obligations under the general duty clause.
- Utilize the Materials Available to you on POSH!



The screenshot shows the homepage of Polsinelli Online Solutions. At the top, there is a navigation bar with the company logo on the left and links for 'About', 'Our Services', 'Our Resources', 'Request Demo', and 'Contact Us' on the right. A search icon, a star icon, and a 'Logout' link are also present. Below the navigation bar is a large banner with a colorful, abstract background and the text 'Welcome to Polsinelli Online Solutions'. Underneath the banner, a paragraph describes the service: 'Polsinelli's Online Solutions provides home health, home care and hospice providers with guidance, forms, tools and other resources to navigate the complex legal and regulatory environment unique to these industries. The subscription services available are configurable to the unique needs of your organization and customizable to expand as the organization does. The service aligns traditional legal documents with state-of-the-art technology solutions.' Below this text are two buttons: 'Request a Demo' and 'Request Assistance'. To the right of the main text is a section titled 'Upcoming Events' featuring a card for 'A POLSINELLI EVENT' with a date of 'March 23, 2022' and a title 'The Provider's Perspective on Effective Compliance Strategies for the Consumer-Directed Model'. At the bottom of the page, there is a section titled 'My Subscriptions and Tools'.



OSHA Healthcare ETS (June 2021)

Status of the ETS

- Effective June 21 through December 21, 2021
- Original comment period lasted until August 20, 2021
- New comment period: March 23 through April 22, 2022
- Public hearing (virtual) set for April 27, 2022
- Goal: convert the ETS into a permanent standard in the near future

Requirements

- Requirements added in June:
 - Develop and implement a written COVID-19 plan
 - Pay employees while they are removed from the workplace
 - Pay employees for time to become vaccinated and if they experience any side effects
 - Provide training in certain areas
 - Establish a COVID-19 log of all employee instances of COVID-19 without regard to occupational exposure
- Requirements we were already doing:
 - Screening patients/clients
 - Maintaining policies related to Standard and Transmission-Based precautions
 - Providing PPE
 - Screening employees
 - Removing from the workplace employees with symptoms of COVID-19 and those confirmed to have COVID-19
 - Training employees on COVID-19 related matters

OSHA ETS Specific Resources

ETS Materials and Information



the OSHA Covid-19 Emergency Temporary Standard

This document will give you a brief overview of the steps an agency needs to take to come into compliance with the OSHA COVID-19 Emergency Temporary Standard.(ETS)

Learn More

→ [Summary of Action Steps to Comply with the OSHA COVID-19 Emergency Temporary Standard](#)

OSHA Template Plan & Training Webinar

FORM 1

Note: This form is intended to be used to provide notice to employees that their employer encourages them to become vaccinated against COVID-19 and to notify the employer in such an event.

VACCINATION STATUS REQUEST NOTICE

[Insert name of company] ("Agency") encourages (but is not currently mandating) employees to receive a COVID-19 vaccine. The Centers for Disease Control and Prevention has stated that COVID-19 vaccines are effective at keeping you from contracting COVID-19 and will also help keep you from getting seriously ill even if you do get COVID-19. The vaccine may also protect you from spreading the disease to others, including out frail and infirm clients.

Once you have received the vaccine, we ask that you notify us. Please note, when you notify the Agency that you have received the vaccine, you may be asked to provide a copy of your COVID-19 Vaccination Record Card for verification. This information will help the Agency make decisions regarding its COVID-19 response plans. The Agency will not disclose your vaccination status unless you authorize the Agency to do so.

ACKNOWLEDGMENT

I acknowledge receiving the notice contained in this document.

Signature

Printed Name

Title

Date

Electronic signature alternative:

I understand and agree that checking the "I Agree" box below is my electronic signature. I also acknowledge my receipt of the notice provided in this document. My electronic signature is as legally binding as an ink signature.

I Agree

OSHA ETS Specific Resources

STEPS A HOME-BASED CARE PROVIDER SHOULD TAKE TO COMPLY WITH THE OSHA COVID-19 EMERGENCY TEMPORARY STANDARD (ETS) (29 C.F.R. §§ 1910.502, *et seq.*)

What a law firm should be. SM

STEPS A HOME-BASED CARE PROVIDER SHOULD TAKE TO COMPLY WITH THE OSHA COVID-19 EMERGENCY TEMPORARY STANDARD (ETS) (29 C.F.R. §§ 1910.502, *et seq.*)

1. Develop a COVID-19 Plan
 1. The Plan must be written if you have more than 10 employees
 2. Seek the input and involvement of non-managerial employees and their representatives, if any, in development and implementation of the Plan
2. Designate one or more Safety Coordinators to implement and monitor the COVID-19 Plan (they should be knowledgeable in infection control principles and practices as they apply to the workplace)
3. Conduct a workplace-specific hazard assessment (you must seek the input and involvement of non-managerial employees and their representatives, if any, in this process)
4. Monitor the workplace to ensure ongoing effectiveness of the COVID-19 Plan (update as needed)
5. Implement a patient/client screening process
6. Implement policies to adhere to Standard and Transmission-Based Precautions
7. Make appropriate PPE available to employees
8. Implement protocols if performing aerosol-generating procedures on persons suspected or confirmed to have COVID-19
9. Encourage physical distancing when and where possible
10. Install physical barriers where feasible in areas outside patient/client care areas
11. Implement cleaning and disinfecting protocols
12. If you own or control the building, maximize ventilation
13. Implement an employee screening process
14. Develop template notification documents for exposed employees and other employers whose employees also may have been exposed at the same time as yours
15. Implement medical removal protocols
 1. Determine who and when to test employees for COVID-19
 2. Determine when you will provide medical removal protection benefits (medical removal benefits are not required for employers with 10 or fewer employees)
 3. Determine when you will allow employees to return to work
16. Encourage employees to become vaccinated (you should also be mindful of any state or municipal regulations governing this issue)



2022 Federal and State Laws

Election Year

- All 435 U.S. Rep's up for Re-election + 34 Senate Seats
- Who is in control?
 - Senate: 48 Democrats, 50 Republicans, 2 Independents
 - House: 222 Democrats, 210 Republicans, 3 Vacancies



Biden Executive Order re Non-Competes

- Issued on July 9
- “**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

Examples of How State Non-Compete Laws Differ

- 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

Commonly Targeted Practices: Understand and Learn To Avoid

- Paying mileage vs travel time
- Not reimbursing mileage for minimum wage workers
- Not including on-call pay and bonuses in overtime
- Not paying for meetings and “non-productive” time
- No scheduling agreement for live-ins/ 24-hour caregivers
- Manipulation of pay rates
- Failure to comply with unique state and city “gotcha laws”
- Joint employer claims for shared employees
- Not paying orientation, training
- Classification of substitute caregivers as contractors
- Missed or interrupted meals
- Not monitoring or paying remote work (e.g., charting)
- Reported hours being inconsistent with other records
- Rounding above certain intervals or pattern of rounding down
- Delaying pay if timesheets or paperwork are late
- Not providing wage theft notices or including all information needed on paystubs
- Incorrectly using meal and lodging credits

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.](#)

Agency: Wage and Hour Division

Date: February 1, 2022

Release Number: 22-171-NAT

Media Contact: Edwin Nieves

DOL Audits

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 Cont.

- **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

Conduct a Self-Audit

- Review job descriptions.
- Understand both federal and state law and ensure you are in compliance.
- Ensure that FLSA classifications are correct.
- Keep accurate payroll records.
- Apply policies consistently.
- Make sure all records are complete and work to resolve any inconsistencies.
- Determine how to address any areas of concern identified via the self-audit.

An Effective Compliance Program for Non-exempt Employees

Wage and Hour Policies

Eliminate Assumptions

Complaint and Investigation Procedures

Training

Audits

Arbitration Agreements with Class/Collective Action Waivers

State Laws Vary – Reduce Risk w/ POSH

- Wage and Hour
- State Licensing
- Joint Employer
- Vaccine Mandates
- State HR Forms

The screenshot shows the homepage of the Polsinelli Online Solutions website. At the top left is the logo for Polsinelli Online Solutions. To the right of the logo is a navigation menu with links for 'About', 'Our Services', 'Our Resources', 'Request Demo', and 'Contact Us'. Further right are icons for search, a star, a user profile, and a 'Logout' link. Below the navigation is a large banner with a colorful, abstract background of light streaks and the text 'Welcome to Polsinelli Online Solutions'. Underneath the banner is a paragraph of text describing the service: 'Polsinelli's Online Solutions provides home health, home care and hospice providers with guidance, forms, tools and other resources to navigate the complex legal and regulatory environment unique to these industries. The subscription services available are configurable to the unique needs of your organization and customizable to expand as the organization does. The service aligns traditional legal documents with state-of-the-art technology solutions.' Below this text are two buttons: 'Request a Demo' and 'Request Assistance'. To the right of the main text is a section titled 'Upcoming Events' featuring a card for 'A POLSINELLI EVENT' with a date of 'March 23, 2022'. At the bottom of the page is a section titled 'My Subscriptions and Tools'.

Backburner? Before you do, check this out!

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

_____, individually and)
on behalf of all others similarly situated,)
Plaintiff,) CASE NO. _____)
v.)
_____,)
Defendant.)
)
) 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 Act ("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.

This transmission is intended only for the proper recipient(s). It is confidential and may contain attorney-client privileged information. If you are not the proper recipient, please notify the sender immediately and delete this message. Any unauthorized review, copying, or use of this message is prohibited.

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

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Please connect with us at poshdemo@polsinelli.com

or

text **CARE** to [833.986.3448](tel:833.986.3448)

**Meet Kendall O'kane, Business Development Specialist
during breakfast, lunch and break**

Questions?