

LUNCH BREAKS OR PATIENTS: DO YOUR EMPLOYEES HAVE TO CHOOSE?

If you are in the healthcare industry, particularly if you are a hospital or nursing home, you already may have felt the pressure from employees and/or government agencies to review your pay practices. If not, that pressure soon may be on its way from at least a couple of sources.

First, an increasing number of wage and hour lawsuits have targeted pay practices in the healthcare industry. Many of these have involved allegations that employees have been "forced to choose" between helping a patient or taking a break. This "choice" can become the basis for litigation on two grounds. One, many states require employees to be provided with a "break" whether in the form of a rest or a meal period. During these periods, the law requires that employees are supposed to be completely relieved from all of their job duties, such that remaining continually responsible for patient care "at all times" during their shifts will constitute a violation of these statutes – if the employees also can show that they actually had to provide such care on a regular basis or "more often than not" during their "breaks." Two, to the extent an employer utilizes automatic pay deductions for breaks, employees who have chosen responding to patient care needs over taking such breaks then can sue for lost pay for time they actually were working. In other cases, employees claim that they have been classified incorrectly – that they are not in fact "exempt" based on the nature of their day-to-day job duties and should be receiving overtime. As the settlements or other payouts in these usually class-certified denial of break time and wage and hour cases are very large and well-publicized, the "popularity" of healthcare industry employers as defendants in these lawsuits necessitates your attention to making sure you are aware of what your employees actually are doing day in and day out regarding "breaks" and "exempt" versus "non-exempt" job responsibilities.

The second potential source of this pressure is that the Obama administration also has decided to enter the fray. The U.S. Department of Labor (DOL) recently has hired 250 new wage and hour investigators, amounting to a one-third increase in its staff. Among other things, this increase in personnel is being used to increase the number and depth of investigations of residential healthcare facilities and assisted living facilities nationwide. We currently are aware of such investigations being undertaken in New York, Connecticut, Rhode Island, Alabama and Mississippi. The reason for this "extra attention" in the health and residential care industry is the DOL often targets industries where prior investigations have shown a lack of compliance with wage and hour laws. In New York alone, for example, the DOL claims that less than thirty-six percent (36%) of the healthcare employers investigated by its Albany Office were in compliance with federal (let alone state!) wage and hour laws. These types of statistics no doubt will help fuel the fire for additional future DOL investigations in the health and residential care industry.

So, what can you do?

- Make sure you recently have audited what is actually going on at your facilities regarding employee day-to-day job duties and breaks – do not rely only on what your policies and/or job descriptions say.
- Before conducting this audit, however, consider how an attorney can assist in this process (as far as helping you know how to adequately sample your workforce as

well as what questions to ask in order to elicit the information you need to obtain useful internal audit results) and whether there is value in potentially having the investigation and the recommendations that arise therefrom protected by the attorney-client privilege by getting an attorney involved on the frontend.

- As we speak, the DOL is working on new wage and hour regulations which would require all employers to be able to provide the results of such audits to their employees and/or government agencies on demand. So best get your house in order now!

Our labor and employment law attorneys have helped numerous employers, small and large, local, regional and nationwide, perform these audits. So we welcome the opportunity to assist in yours, preferably before, but even after a wage and hour lawsuit or the DOL comes knocking on your front door. Please feel free to contact [Karen Smith](#) or [Eric Stevens](#) or your [Miller & Martin Labor and Employment attorney](#) for more information regarding such audits.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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