



Healthcare Industry **ALERT** SEPTEMBER 17, 2010


Department of Labor, plaintiffs' attorneys targeting healthcare industry for FLSA enforcement

BY NATHAN WHATLEY

The United States Department of Labor (DOL) continues to go after employers in a cluster of industries for Fair Labor Standards Act (FLSA) violations, according to a former administrator of the Wage and Hour Division, and some DOL district offices are investigating employers in the healthcare industry in particular. According to the former administrator, the DOL has targeted employers in low-wage industries for wage and hour violations for years, but because pay is better in healthcare than industries such as fast food, the healthcare industry is an attractive target for the DOL and private wage and hour litigants.

Common Violations

Certain types of wage and hour violations are prevalent in different industries. The following issues arise frequently in the healthcare industry:

- Meal period violations, including automatic deductions for meals even when those meal breaks are interrupted by work or not taken in full because of an emergency.
 - Rounding time in the employer's favor. Rounding of hours is allowed if it results in a neutral impact on workers but not if rounding is in the employer's favor.
 - Pre-shift/post-shift time, which might come into play, for example, when donning or doffing equipment, such as in a radiology department.
 - Off-the-clock work, particularly if supervisors tell employees not to record time worked in an attempt to avoid paying overtime.
 - Travel time. This issue often arises with home healthcare workers when they are not compensated for the time spent traveling between worksites.
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- Failure to aggregate work hours. The DOL might view time worked at two or three hospitals as time that should be aggregated if it believes that the hospitals are the same employer.
 - Independent contractor vs. employee vs. joint employee. Employers that use independent contractors or staffing agencies are vulnerable to claims that the independent contractors or temporary workers are their employees.

Traditional misclassification of workers as exempt who should be nonexempt is also a frequent problem. For example, there have been many claims that the professional exemption should not include a nurse who does not rise to the level of a registered nurse. Also, some healthcare professionals are misclassified as executives when their primary duties really are patient care, not management. The companionship services exemption also has been challenged when the work performed in someone's home falls outside the exemption.

DOL Initiatives

The DOL received an increased budget for 2010, and employers have seen stricter federal enforcement of wage and hour laws and hundreds of additional field investigators. Some Wage and Hour Division district offices have local initiatives involving healthcare employers, according to a deputy regional director of the DOL's Office of Public Affairs. In a release announcing the initiative, DOL noted that fewer than 36 percent of healthcare employers investigated during the past five years were in compliance with the FLSA. An average of \$468 per employee was found to be owed by employers who were investigated during that time.

Private and Public Enforcement

In addition to actions by the DOL, the healthcare industry is being hit by private litigants. There has been a surge of wage and hour cases nationally because of the ease of certifying a large wage and hour class, and because the cases are often cut and dried with the back wages owed typically being a clear calculation. Training can help educate managers and rank-and-file employees about company policies for off-the-clock work and overtime. Training also can help shield employers from liquidated damages if they get embroiled in wage and hour litigation, she said.

The best chance of avoiding or minimizing liability from a DOL investigation or wage and hour suit is to proactively review existing employee classifications and pay policies. A self audit can identify potential problems with an employer's policies and can also help determine whether managers are properly implementing the organization's policies. Wage and hour law can be counterintuitive, and is widely misunderstood, so training can help employers avoid missteps.

If you have any questions about wage and hour issues, or would like assistance in reviewing your current payroll practices or in preparing or conducting manager training, please do not hesitate to contact any of the healthcare industry employment lawyers listed below:

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