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Protecting Against Wage and Hour Class Action Lawsuits

Over the past six years, legal actions brought under the federal Fair Labor Standards Act have nearly doubled. Because these actions can be costly on multiple levels, all hospitals should consider doing a wage and hour audit to avoid or, at least, minimize, exposure to such lawsuits.

The following OHA Bulletin (1) explains the basics of federal and Ohio compensation law, (2) describes wage and hour problems common in the health care industry and (3) provides a checklist to be used as a preliminary wage and hour self-audit. In addition to reviewing this bulletin, Ohio hospitals are advised to consult legal counsel for a detailed wage and overtime compensation analysis.

To: Chief Executive Officers
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Recently, courts have seen a surge of class action lawsuits brought under both state and federal laws governing the payment of wages and overtime compensation. Even sophisticated and legally savvy companies are finding themselves the targets of wage and hour class action lawsuits, the resolution of which can be costly, to say the least. For example, last year insurance giants State Farm and Allstate agreed to pay \$135 million and \$120 million, respectively, in settlement of suits by claims adjusters who asserted that they were entitled to overtime pay. Similarly, a food processing company recently settled a class action lawsuit alleging that the company had failed to pay its employees for the time that they spent putting on, taking off and cleaning their equipment. This failure, which concerned only a few minutes of each workday, cost the company \$10 million in settlement.

Wage and hour class action lawsuits are also being brought against hospitals. For example, last year, Los Robles Hospital & Medical Center in California agreed to pay \$4.75 million to settle a lawsuit alleging that the hospital miscalculated overtime pay and failed to compensate workers for missed meal and break periods. Increasingly, these actions are initiated as part of union corporate campaigns attacking the reputation of a

particular hospital or hospital system. In fact, this spring, hospital employees in Cincinnati and around Ohio filed a class-action lawsuit against Catholic Healthcare Partners alleging that the hospital system “systematically shortchanged” employees of wages by refusing to allow them to take lunch breaks and by failing to pay overtime. At least some of the named plaintiffs are members of the Service Employees International Union District 1199. Accordingly, all hospitals should consider doing a wage and hour audit to avoid or, at least, minimize exposure to class action lawsuits and to “shrink the target” as corporate campaign tactics become more widespread throughout Ohio.

THE BASICS

The federal Fair Labor Standards Act (FLSA) and Ohio’s Minimum Fair Wage Standards Act (the Ohio Act) regulate the payment of minimum wages and overtime compensation to most employees in Ohio. The Department of Labor and the Director of Industrial Relations are authorized by statute to investigate and determine compliance with the FLSA and Ohio Act, respectively. However, in addition, under the FLSA, individual employees or groups of employees may sue an employer to collect past-due wages.

Hospitals and other institutions “primarily engaged in the care of the sick, the aged, or the mentally ill” are “covered employers” under the FLSA. Accordingly, hospitals, residential care establishments, skilled nursing facilities, nursing facilities, assisted living facilities, residential care facilities and intermediate care facilities for the mentally retarded and developmentally disabled must comply with the minimum wage and overtime requirements of the FLSA. Although certain employees are exempt from all or some of the statutory requirements, both the FLSA and the Ohio Act apply to all individuals employed by a covered employer.¹

Under existing law, all non-exempt employees must be paid a minimum wage of at least \$5.15 per hour. Additionally, all non-exempt employees must be compensated at one and one-half their regular rate of pay for all hours worked in excess of 40 in a workweek. Significantly, the FLSA also allows healthcare employers to calculate overtime, in certain circumstances, based on a 14 day period and, instead, to pay overtime after 80 hours of work in that 14 day period provided the employer also pays overtime for all hours worked in excess of 8 in a given workday. This method is referred to as the “eight and eighty” system.

The FLSA defines exemptions from both minimum wage and overtime pay requirements for bona fide executive, administrative, and professional employees as well as certain computer employees and outside sales personnel. To qualify for exemption, employees must meet particular tests regarding their job duties, salary basis and salary amount. On April 20, 2004, U.S. Secretary of Labor Elaine Chao announced revised regulations that concern millions of employees’ eligibility for overtime under the FLSA. These new

¹ When both the FLSA and a state law apply, the higher standard must be observed. Under existing Ohio law, the FLSA has higher minimum wage standards than the Ohio Act. Accordingly, most references within this memorandum are to the FLSA.

regulations, which constitute the first significant revisions in the Department of Labor's overtime guidelines in 50 years, seek to clarify and simplify the tests that must be applied by employers to determine which employees are entitled to overtime compensation. These revised regulations became effective on August 23, 2004.

VULNERABILITIES IN THE HEALTH CARE INDUSTRY

The U.S. Department of Labor has issued fact sheets describing the most common FLSA violations found by its Wage and Hour Division during its investigations in the health care industry. Although the basics of wage and hour law may appear to be relatively straight-forward, application of these concepts can quickly become complicated and incorrect assumptions can result in costly compensation errors.

The "Regular Rate" of Pay

Most of the problems discovered by the Department of Labor in the health care industry concern the calculation and payment of overtime compensation. As indicated above, all nonexempt employees must be paid at least time and one-half of their "regular rate" of pay for all hours worked over 40 in a workweek. A common error in calculating overtime pay by health care employers is the failure to include bonuses, shift differentials and other types of compensation in the "regular rate" of pay. In fact, "regular rate" must include an employee's hourly rate plus the value of other types of compensation such as bonuses and shift differentials. The only types of compensation excluded from the "regular rate" are certain specified payments such as discretionary bonuses and gifts. However, very few bonuses are considered to be discretionary under the FLSA. Non-discretionary bonuses such as those that are announced to employees to encourage them to work more steadily, rapidly or efficiently and retention bonuses must be included in the calculation of the "regular rate" of pay.

In addition, health care employers often miscalculate the "regular rate" of employees who work two or more different jobs in the same workweek. If the two jobs earn different straight-time hourly rates, the employer may use a weighted average to compute the employee's "regular rate." However, the employee and employer in this situation may agree in advance that payment for overtime hours will be at a rate not less than one and one-half the hourly rate established for the type of work the employee actually performs during the overtime hours.

The Eight and Eighty Overtime System

Health care employers also often have problems applying the 8 and 80 overtime system to its employees. To use the 8 and 80 system properly, an employer must have a prior agreement or understanding with the employee that the 8 and 80 system will be used before the work is performed. The 14 day work period must be fixed and regularly recurring. This 14 day period may only be changed if the change is planned to be permanent and not to avoid overtime requirements. Finally, although employers may use

both the 40 hour overtime system and the 8 and 80 overtime system with different employees, employers may not apply both systems on any individual employee.

Hours Worked

Other common wage and hour mistakes made in the health care industry concern the payment for hours worked. Non-exempt employees must be paid for all hours worked in a workweek. Generally, “hours worked” includes all time an employee must be on duty, on the employer premises, or at any other prescribed place of work. Also included is any additional time the employee is “suffered or permitted” to work. The FLSA requires employers to pay for hours actually worked, but there is no requirement for payment of holidays, vacation, sick or personal time.

Meals and Breaks

Classification of meal and other breaks frequently results in problems in calculating hours worked. Bona-fide meal periods, which are typically 30 minutes or more, are not work time and an employer does not have to pay for them. However, the employees must be completely relieved from duty to have this time deducted from hours worked.

Accordingly, employers must ensure that their employees are receiving their full meal break before automatically deducting 30 minutes per shift. On the other hand, short rest periods, generally 5 to 20 minutes, are considered work time and must be counted toward hours worked. Employees may not substitute three unpaid 10 minute breaks for one 30 minute unpaid meal break.

On-call

Occasionally, health care employers have difficulty determining when an employee is working on call and, therefore, entitled to compensation. An employee who is required to remain on call on the employer’s premises or so close to the premises that the employee cannot use the time for his or her own purpose is considered to be working on call. However, an employee who must carry a cell phone or beeper but who is allowed to leave the premises is usually considered not to be working while on call. Time spent responding to calls or time when employees must return to work must be compensated as hours worked. Additional constraints on the on call employee’s freedom may require compensation for hours worked while on call.

Unscheduled Time Worked

Another area where health care employers occasionally encounter wage and hour violations concerns payment for unauthorized hour worked. The FLSA requires that employees must be paid for work “suffered or permitted” by the employer even if the employer does not specifically authorize the work. Rather, if the employer knows or has reason to believe that the employee is continuing to work, the time must be considered hours worked and compensated accordingly. For example, nurses who stay beyond their scheduled shift to work on patients’ charts must be compensated for the additional time worked, even if that additional time was not formally authorized.

Rounding Errors

One frequent problem encountered in calculating hours worked occurs when employers fail to round up when necessary. Although the FLSA allows an employer to round employee time to the nearest quarter hour, the employer may violate the FLSA if it always rounds down. Accordingly, time from 1 to 7 minutes may be rounded down and, therefore, not counted toward hours worked, but time from 8 to 14 minutes must be rounded up and counted as a quarter hour of work time.

Travel Time

Another problematic “hours worked” issue concerns travel time. Time spent by an employee in travel as part of his principal activity, such as travel from one jobsite to another during the same workday, must be considered to be part of hours worked. However, travel from home before the regular workday and travel to home at the end of the workday is ordinary home-to-work travel and not considered hours worked.

Training

A few health care providers have failed to count time spent attending training as hours worked. The FLSA requires payment for time spent attending lectures, meetings or training programs unless all of the following criteria are met: (1) attendance is outside of the employee’s regular working hours; (2) attendance is truly voluntary; (3) the course, lecture, or meeting is not directly related to the employee’s job; and (4) the employee does not perform any productive work during such attendance. Attendance at staff meetings must be counted toward hours worked.

Exemption for Nurses

Finally, another common and frequently litigated wage and hour issue experienced by health care providers concerns determining when nurses qualify for the “learned professional” exemption from the FLSA’s wage and overtime requirements. Registered nurses who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally also meet the duties requirements for the “learned professional” exemption. If these nurses are paid on a salary basis of at least \$455 per week, they may be classified as exempt.

Unlike registered nurses, licensed practical nurses and other similar health care employees generally do not qualify for the “learned professional” exemption, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations. Accordingly, these health care employees are entitled to overtime pay. Because the determination of whether a nurse or other health care employee should be classified as exempt is highly situation specific, hospitals should refer to the FLSA’s revised regulations and/or consult legal counsel.

If you have any questions regarding the information provided within this bulletin, please contact Mary L. Gallagher or Nancy Engbers Falk at the Ohio Hospital Association.

Attachments:

- Wage and Hour Checklist