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PREVENTIVE MEDICINE
Legal Tips for Healthcare Employers

Have You Taken Your Hospital's Pulse Lately?

FLSA Collective Actions Are Healthcare's Next "Big" Thing!

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While healthcare executives have been bracing themselves for the impact of 2010's healthcare reform, another threat to the well-being of your healthcare system has gone largely ignored. Wage and hour actions targeting the health care industry have exploded recently, exposing hospitals to expensive and time consuming litigation. This trend is expected to continue into the immediate future. A recent $8.5 million settlement involving a Massachusetts hospital illustrates the vulnerability hospitals face. In that case, attorneys sued claiming that the hospital failed to appropriately pay hourly workers for time worked before and after their scheduled work shifts and during interrupted or missed meal breaks. Workers also claimed that they were not properly compensated for training time. The same law firm extracted a $9 million wage and hour settlement from a New York hospital.

The threat comes from not only the plaintiffs' bar, but from the federal government as well. Secretary of Labor Hilda Solis has made it clear that the of the U.S. Department of Labor (DOL) is "back in the enforcement business." As a result, wage and hour investigations are on the rise. This initiative by the DOL (creatively titled "We Can Help") promises to catch many employers, especially healthcare employers, unaware. The healthcare industry is a particular target. The DOL has stated that one regional investigation of Fair Labor Standards Act (FLSA) compliance among healthcare employers found only a 36% compliance rate. With the cost of non-compliance stretching into the millions of dollars, healthcare employers should give immediate attention to engaging in a compliance self-assessment.

Compounding the problem are the recent aggressive marketing efforts by the plaintiffs' bar. Websites such as hospitalovertime.com proclaim:

> *Our team of attorneys is currently seeking to recover back wages for hourly employees in the health care industry. Some health care employers have their hourly employees work through part of their meal periods but still do not pay them for their meal periods . . . if you:*
>
> - *Worked as an hourly employee for a health care institution;*
> - *Worked for at least part of a meal period; and*
> - *Were not paid for that meal period;*
>
> ***You may have legal rights to protect and you have a choice to make . . . to see if you can participate.***

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Recent Trends

Automatic Meal Deductions

The FLSA does not require that an employer provide employees with lunch or coffee breaks. However, when employers do offer short breaks (usually lasting 5 to 20 minutes), the FLSA requires that this time be considered work time—pay is required and time is included when determining if overtime was worked. In contrast, genuine meal periods (typically lasting at least 30 minutes), are not work time and are not required to be paid, as long as the employee is truly not working.

Many recent class-action suits regarding wage and hour violations of the FLSA have involved automatic meal-time deductions. Settlements for these suits have reached into the millions of dollars. The common manifestation is a claim of violation of the FLSA by employers who *automatically* deduct a 30-minute meal period. While this practice itself is not unlawful, many hospital employees, like nurses, sporadically work during the "break period." It is ultimately the hospital's responsibility to ensure that the meal break is uninterrupted. Although this unpaid time may only amount to a few minutes a day, over the course of a multiple years and thousands of employees the back pay can be staggering, particularly when one considers that the law provides for automatic liquidated damages in an amount equal to the unpaid overtime. On top of that, attorneys' fees can be awarded to the employees.

Off the Clock Work

In addition to lawsuits regarding improper meal deductions, another trend is lawsuits for unauthorized hours of work. In such a situation, off-the-clock work is performed by the employee, but it is not recorded by the employer as time worked. In a non-health care setting, the most common example of off-the-clock work is time spent by employees at home during weekend and other non-business hours. In health care, "off the clock" work includes employees who may "come early" and start working before the official start time of their shifts and nurses who continue to work after their shift ends. Such time counts as work time and must be included in FLSA pay computations, provided only that the employer knew or should have known that the employee was beginning work early or working late (and, of course, to the extent that the employee spent pre-shift or post-shift time actually performing work activities). It does not matter that the hospital has a policy prohibiting overtime without pre-approval.

Similarly, pre-shift "roll calls" are also considered work time, as is time spent setting up equipment before the official start time of a shift. The FLSA mandates that off-the-clock work by non-exempt workers must be recorded by the employer. If these off-the-clock hours include overtime, the employer must pay overtime wages for this time.

Training and Seminars

Most training time is "work time." Training time is work time if it occurs during an employee's regular shift, or if it is required by the employer.

Training time need not be counted as work time *only* if it meets the following criteria:

- It occurs outside of an employee's normal work schedule,
- It is truly voluntary (where there is neither direct nor indirect pressure on the employee to attend, and no

"come back" if the employee chooses not to attend),
•It is not directly related to the employee's current job (i.e., the training is designed to qualify the employee to get a new job, and not to enhance the skills used by the employee on the existing job), and
•The employee does no other work during the training.

Home Health Care

Home health care workers have a special set of regulations under the Fair Labor Standards Act. For instance, a home health care worker may or may not be entitled to overtime pay, depending on the circumstances of employment. In 2007, the United States Supreme Court provided a defense to claims from home healthcare workers in **Long Island Care at Home v. Coke**. In that case, Long Island Care at Home employed Evelyn Coke as a "home healthcare attendant" for the elderly. Coke sued her employer, claiming rights to overtime and minimum wage under the Fair Labor Standards Act (FLSA). The District Court ruled for Long Island, holding that Coke fell under the FLSA's exemption for employees engaged in "companionship services." The court gave deference to the Department of Labor's regulation – found at 29 CFR § 552.109(a) - which applies the exemption to employees in "companionship services" who are "employed by an employer or agency other than the family or household using their services." Although the Circuit Court of Appeals reversed the decision, the Supreme Court ultimately sided with the employer, finding that the "companionship services" exemption existed.

"Companionship services" means services for the care, fellowship, and protection of persons who because of advanced age or physical or mental infirmity cannot care for themselves. Such services include household work for aged or infirm persons, including meal preparation, bed making, clothes washing and other similar personal services.

While the **Coke** decision is generally good news for healthcare employers, there are two potential issues looming on the horizon. First, during her confirmation hearing Secretary Solis indicated that she would be willing to work with members of Congress to provide additional protections for home healthcare workers, potentially signaling an expansion of workers' rights.

Second, the recent trend has been to litigate whether or not the home health care attendant spent more than 20 percent of his/her time performing general household work. General household work is included under the "companion" definition, as long as the household work does not exceed 20 percent of the total weekly hours worked by the companion. Where this 20 percent limitation is exceeded, the employee must be paid for all hours in compliance with the minimum wage and overtime requirements of the FLSA, unless they fall into another exemption.

What Should You Do?

The best defense is a good offense. Since the clear trend is toward wage and hour litigation in health care, it is important for hospitals and other health care providers to take proactive steps to address the potential liability before a lawsuit arises. We recommend the following:

•If possible, eliminate "automatic" deductions from employees' time for meal breaks. Require people to clock in and out.
•If it is not possible to eliminate "automatic" deductions, develop a policy addressing interruptions during meal breaks and accounting for that time worked.

•Have employees certify hours of work (and make appropriate corrections for missed meal breaks) each payroll period.
•Audit all job categories to address misclassifications.
•Clearly communicate to employees that off-the-clock work is not accepted, and have a reporting mechanism for bringing underpayments to the management's attention.
•Investigate and address all wage and hour complaints.
•Train managers and supervisors on their requirements under the Fair Labor Standards Act.

Conclusion

For more information regarding FLSA trends in health care, contact Jonathan Martin at jmartin@constangy.com or 478-621-2407, or any other Constangy attorney at www.constangy.com.

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