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INSIDE

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Federal Wage and Hour Labor Laws May Confuse Healthcare Employers

By the nature of the work in the industry, healthcare employers can find it challenging to comply with the Fair Labor Standards Act (FLSA), the law that regulates fair compensation for working hours and other workforce limitations. There is a complex list of requirements, made even more difficult by state and local labor laws.

Overtime pay and recordkeeping can trip up any employer, but especially healthcare employers, says **Jacqueline C. Hedblom**, JD, partner with the Hirschler law firm in Richmond, VA.

"It has become a favorite weapon of plaintiffs' attorneys because the possible recovery under the FLSA is so huge," Hedblom says. "FLSA provides not only for individuals to recover wages for hours worked but not paid, but it also has a collective action mechanism that is similar to a class action. You can get one disgruntled employee talking to his or her friends, and before you know it, you have 50 people banding together to press a collective action against the employer."

> THE COMPLEX WORKFORCE DYNAMICS WITHIN A 24-HOUR OPERATION MAKE WAGE AND HOUR COMPLIANCE PARTICULARLY COMPLICATED FOR HEALTHCARE EMPLOYERS.

The collective action can grow quickly, creating significant potential liability and a serious threat to the organization's reputation, she notes.

If there is any indication labor laws were not followed, the employee is entitled to back pay, Hedblom explains. There is an option

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AUTHOR: Greg Freeman
EDITOR: Jill Drachenberg
EDITOR: Jesse Saffron
EDITORIAL GROUP MANAGER: Leslie Coplin
ACCREDITATIONS MANAGER: Amy M. Johnson, MSN, RN, CPN

EDITORIAL QUESTIONS
Call Editor **Jill Drachenberg**, (404) 262-5508

for liquidated damages also in an amount equal to the back pay, so the potential liability includes a double recovery of the back pay.

There is a two-year statute of limitations where it was determined the violations were not willful, she says. There is a three-year statute of limitations for willful violations.

"The law also allows for the recovery of attorneys' fees, which often grossly exceed the back pay damage recovery. The FLSA is so heavily slanted in favor of the employee that it is difficult to even defend against what you think are false allegations because attorneys on both sides are racking up charges," Hedblom says. "If there is any recovery at all for the plaintiffs, even a dollar, the attorneys' fees are recoverable and that is a tremendous risk for businesses."

Meal Breaks Are Difficult

Healthcare employers face difficult challenges with labor laws regarding lunch and dinner breaks in particular, says **Robert L. Kilroy**, JD, partner with the Mirick O'Connell law firm in Westborough, MA. Unlike many other working environments, healthcare employers cannot easily ensure that clinicians can take a designated time period for a meal break, he says.

"The nurse may be scheduled for a lunch break at 2 p.m., but she has a patient alarm go off at 1:55 p.m. and before you know it, she has worked through her lunch break. But many healthcare employers have a payroll system that automatically deducts that time from her paid hours whether she actually got to have lunch or not," he says.

"Over time, that happens and nurses get used to it, considering it just the cost of doing business. That works until someone is disgruntled, picks up on how people are being cheated out of their pay, and now you have a collective action FLSA claim on your hands."

The automatic deduction is the culprit in many such cases, Kilroy says. An employee can voluntarily waive a meal break with a written document that acknowledges the waiver is optional and can be rescinded at any time, he notes.

"Another way you get into trouble is with administrative staff who take their lunch at their desk, and while they're eating they're checking emails and answering the phone," Kilroy says. "All that time is compensable, so some employers will have a requirement that you do not eat at your desk because of the

EXECUTIVE SUMMARY

Healthcare employers are especially at risk of violating the Fair Labor Standards Act. Many practices common in the industry could violate the law.

- Clinicians may be incentivized to work longer hours than the amount for which they are paid.
- Meal breaks are a high-risk area and automatic payroll deductions can lead to violations.
- Home healthcare workers are subject to different rules that may pose compliance challenges.

danger that you will be doing some work also."

Financial constraints on an employer can lead to conditions in which employees feel — rightly or wrongly — pressured to work beyond labor law limits or without adequate compensation, says **Amy L. Blaisdell**, JD, an officer and member of the board of directors at the law firm of Greensfelder, Hemker & Gale in St. Louis.

"At the employee level, that corporate pressure can be felt in terms of reducing the workforce or limiting overtime hours. When an employee becomes unhappy, it is easy for the plaintiff's attorney to say the company was so concerned about saving money that it ignored the fact this employee was working off the clock, or discouraged employees from reporting all the time they worked," Blaisdell says.

"The healthcare industry is particularly susceptible to those claims because it is always trying to transform itself and operate in a lean fashion."

Blaisdell notes that the United States Department of Labor is considering changes to the salary levels that make employees exempt from some labor law restrictions, as well as the required duties test that can exempt some employees.

"The last time they changed the regulations in 2004, we saw a huge spike in litigation over the next five to seven years," she says. "We're going to see another resurgence once the new changes go into effect."

Healthcare employers must emphasize to employees by FLSA that they are specifically not allowed to work overtime without pay or to work from home, Blaisdell says.

"Otherwise, you remain vulnerable to the claim that you were so concerned with saving money that you allowed employees to work uncompensated," she says.

Healthcare Demands vs. FLSA

The complex workforce dynamics within a 24-hour operation make wage and hour compliance particularly complicated for healthcare employers, says **Stephanie Dodge Gournis**, JD, partner with the Drinker Biddle law firm in Chicago. Healthcare providers make big investments in expensive payroll systems that they assume will work to appropriately calculate minimum wage and overtime in compliance with state and federal law, she says — but fancy payroll systems are only as compliant as the manual inputs and formulas used by local payroll staff.

"Often, compliant policies get implemented in noncompliant ways by frontline managers. Frontline managers more often are stretched thin with wide spans of control, and may not be in positions to monitor FLSA compliance on a daily basis — or during off-shifts," Gournis says. "More and more managers rely on their administrative staff to monitor and approve employee payroll. Frontline managers are sometimes placed in the unenviable position of having to fill staffing holes to meet patient needs, while adhering to strict budgets and complicated staffing metrics."

Nurses and other healthcare providers are trained to put patients first, and often the stressful and high-stakes work environment of today's hospitals makes it challenging for caregivers to hand off patients or otherwise ignore patient pagers and monitoring devices in order to take necessary breaks, Gournis says.

"This combination of stressors provides incentive for employees and even well-meaning managers in healthcare organizations to turn a blind eye and ignore the occasional compliance transgression, or to get creative in attempts to incentivize employees to take on additional shifts at all costs," she says.

Targets for Plaintiffs

Healthcare systems often are the biggest employers in their localities, Gournis notes, and they commonly are portrayed in the media and by politicians as having deep pockets and being overly profit-driven. Healthcare institutions use common pay practices that make them particularly vulnerable to cookie-cutter class action lawsuits orchestrated by plaintiff attorneys, she says.

"These factors all combine to make healthcare employers most vulnerable to compliance audits and litigation, and the healthcare industry likely will remain in the compliance spotlight for plaintiff's attorneys and DOL [Department of Labor] regulators on a state and federal level," Gournis says.

She notes that in 2010, the New York State Department of Labor announced a statewide healthcare FLSA compliance initiative based on a five-year survey showing that 64% of healthcare employers in the state were not compliant with wage and hour laws.

Common payroll and staffing practices of healthcare employers significantly increase their compliance risk, including the offering of a matrix of complicated shift differentials and incentive payments as a way to combat low staffing issues, Gournis says. Other common but risky practices include the frequent use of travelers, per diem employees,

contract staff, and independent contractors — some of whom may be working a variety of different roles within a single healthcare system.

Another risk comes from fluctuating staffing needs based on patient census, which increases both overtime and low census. There also is the increased use of wearable communication and tracking devices during meal periods and breaks.

Historical payroll practices of deducting meal periods and rounding employee pay also are risky, Gournis says. Home health and hospice companies and long-term care facilities are at particular risk based on their unique pay practices, use of traveling staff, and historical use of a "per-visit" compensation methodology, she says.

Top FLSA Mistakes

Gournis offers the following list of the top FLSA compliance mistakes by healthcare employers:

1. Misclassification of employee exemption and independent contractor status;
2. Failure to include non-discretionary bonuses and incentive pay in overtime calculation;
3. Compliance errors associated with automatic meal deduction policies;
4. Rounding of employee clock-in and clock-out hours;
5. Pushing and pulling of employee work hours to the day of punch-in;
6. Failure to track off-the-clock work, including employee time spent in training, attending conferences, traveling between facilities, and answering calls, texts, and emails when off-duty;
7. Failure to comply with state and local laws regarding pay deductions, expense reimbursement, leave laws, and day-of-rest requirements.

"Managers are the frontline gatekeepers for a healthcare employer's FLSA compliance. Managers need to be educated on wage and hour laws and compliance obligations, and have a working knowledge of their employer's policies and payroll practices," Gournis says. "Managers also need to be knowledgeable about the legal implications and risks which can result from their failure to follow the employer's rules. Managers must be held accountable for FLSA compliance and must lead by example both in complying with policies on a day-to-day basis and in reporting possible compliance errors."

> "MANAGERS ARE THE FRONTLINE GATEKEEPERS FOR A HEALTHCARE EMPLOYER'S FLSA COMPLIANCE. MANAGERS NEED TO BE EDUCATED ON WAGE AND HOUR LAWS AND COMPLIANCE OBLIGATIONS."

The most challenging part of the FLSA for healthcare employers is the complex array of exceptions and options for healthcare workers offered by the regulations issued by the DOL, says **Jennifer L. Curry**, JD, shareholder with the law firm of Baker Donelson in Baltimore. Knowing which requirements apply to your employees can be dizzying, she says, particularly because the healthcare industry is comprised of such a wide variety of businesses, each with a staggering variety of employees.

"Because of the technical nature of the FLSA and the DOL's regulations, it is imperative that healthcare employers understand how their business is defined under the law and which categories of employees they have on their rolls to know what pay-related issues they must be attuned to," Curry says. "Overtime issues and break requirements pose the greatest risks for healthcare employers right now. The home care industry was hit particularly hard by the DOL's decision to remove the 'companionship service' overtime exemption from home care workers employed by third-party providers."

Under the FLSA, certain domestic-service workers were exempt from overtime requirements, including those providing "companionship services" in the homes of individuals who are unable to care for themselves, Curry explains. Previously, the DOL took the position that this exemption applied to all home care workers, whether employed directly by members of the household or by a third-party provider. As a result, many home healthcare companies built their business models around this exemption.

The DOL was relatively dormant for a few years in enforcing its position, but the beginning of 2019 showed the DOL was readying to take enforcement action. It began issuing request for information letters and audit notices to home healthcare entities throughout the country, seeking employee and compensation records, Curry says. For home healthcare employers who have yet to comply with the DOL's exemption

decision, the new enforcement effort has meant facing a host of back pay awards and penalties for unpaid overtime, she says.

"This year has also brought an influx of class action FLSA lawsuits arising primarily in long-term care and hospital settings where nurses and other employees allege that they routinely perform work off the clock, for which they are not properly compensated," Curry says. "The complaints most often focus on the employers' use of so-called 'automatic' meal break deductions, which assumes that the employee received an entire uninterrupted meal period that then goes unpaid."

30-Minute Meal Periods Can Be Tricky

The regulations make clear that an employee does not need to be compensated for a bona fide meal period provided the employee is ordinarily allowed 30 minutes and he or she is completely relieved from duty during that period, Curry explains. Of course, in the healthcare industry, an uninterrupted 30 minutes can be rare.

"As a result, timekeeping systems with the built-in assumption of a 30-minute, unpaid meal break may end up denying an employee a full week's pay or overtime for hours worked over 40 in a workweek," Curry says.

In addition to overtime and break issues, misclassification of nurses remains a major target of both the DOL and employee plaintiffs, Curry says. Under the DOL regulations, registered nurses generally meet the learned professional exemption to the FLSA if they are licensed with the appropriate state examining board and are paid on a salary or fee basis, but the regulations specifically exclude licensed practical nurses from the exemption, she says.

"Specifically, professional certification is not by itself sufficient to support classification as exempt because such status also depends on the duties actually performed by the nurse and whether the nurse is paid on a salary basis," she says. "Therefore, employers focused solely on an employee's certification, and not the work the employee is actually tasked with performing, are likely to run afoul of the overtime exemption provisions."

Review Policies to Ensure Compliance

Every healthcare employer should review its wage payment policies and practices with the utmost scrutiny, and make sure that their managers understand the policies and consistently and accurately apply those policies, Curry says. In conducting this review, employers should actively open lines of communication with employees about meal break policies, including the importance of taking full meal breaks and the means by which interrupted or missed breaks must be reported so employees can be compensated.

"Also emphasize the critical responsibility employees have for following complaint procedures to bring any problems — real or perceived — promptly to your attention," Curry says. "Healthcare employers should also make it a priority to regularly train employees and managers on topics such as certification of time worked and receipt of meal breaks, accurate time reporting, exception reporting, and deduction overrides."

Meal and rest break compliance can be particularly difficult for healthcare employers on overnight shifts when staffing is leaner, says **Laurel K. Cornell**, JD, partner with the law firm of Fisher Phillips in Louisville, KY.

Many states have laws requiring that uninterrupted meal periods be taken within a certain time frame during the employee's shift. This can be difficult to manage depending on the number of employees working on a particular shift and the operational needs of the employer, she says.

Classification of Employees

Appropriate classification of certain healthcare employees also can be challenging, she says. For example, while registered nurses can appropriately be classified as exempt pursuant to the learned professional exemption, this classification is not automatic and depends on the duties being performed by the particular RN, she explains.

Some states have daily overtime requirements, which can easily be triggered in the healthcare setting — particularly when employers experience difficulty finding coverage on less desirable shifts and must resort to asking certain employees to stay later or work double shifts, she says.

"Many healthcare employers, such as hospitals, nursing homes, and assisted living facilities, operate 24 hours a day, seven days a week, 365 days a year. This can pose staffing challenges, which often result in issues relating to, among other things, overtime and meal and rest break compliance," Cornell explains.

"Many healthcare employers have on-call employees. Determining how much of the time an employee spends on call is compensable, as well as ensuring accurate recording of all time worked during an on-call period, can be challenging. This, of course, can also have overtime implications."

One of the most common FLSA violations in the healthcare setting is the failure to pay employees for all hours worked, which often stems from inaccurate time recording, Cornell says. Common scenarios of when hours worked may not be accurately recorded are employees working while off the clock either during meal periods or before or after their scheduled shift, not recording all time spent during mandatory staff meetings or training sessions, and not recording all time worked by an employee during on-call periods, Cornell says.

"Some healthcare employers offer various forms of incentive pay to encourage employees to pick up additional shifts or to agree to on-call duty, or offer attendance bonuses to help ensure adequate staffing," she says. "Both of these forms of additional compensation can impact the regular rate analysis if the employee works overtime in the same work week he or she received the incentive pay or bonus."

Many healthcare employers require employees to wear uniforms of some sort, and assume the costs associated with uniforms can automatically be deducted from employees' pay, Cornell notes. While this practice is not immediately problematic, such deductions depend on the type of uniform employees are required to wear and whether it is of such a character that it may be reasonably worn outside the context of work, she explains.

"Healthcare employers can make themselves vulnerable to FLSA claims by allowing nonexempt employees to perform work remotely," she says. "For example, a non-exempt scheduler charged with responding to call-outs and lining up coverage outside of the scheduler's normal working hours can be problematic, particularly if the amount of time the employee spends taking and addressing such calls is not accurately recorded."

Reducing the risk of FLSA violations depends on the uniform and consistent enforcement of policies related to meal and rest breaks, along with accurate recording of all time worked, Cornell says.

"Monitor time records to ensure employees are clocking in and out and taking required meal breaks during the appropriate time frames as may be required by state law," she says. "Also, consider having employees attest to having received meal and rest breaks before allowing them to clock out for the day."

Factor in State and Local Laws

Like most employers, healthcare employers face not only challenges with FLSA compliance, but also with state and local wage and hour laws, notes **Keith J. Gutstein**, JD, co-managing partner of the Woodbury, NY, office of the law firm Kaufman Dolowich Voluck.

For example, the FLSA mandates that nonexempt employees be paid overtime premium pay for hours worked in excess of 40, and that certain documentation, such as time records, be maintained for employees, he says. States have the same requirements, if not more.

"For instance, New York State requires that certain employees be paid 'spread of hours' pay if their day exceeds 10 hours, and mandates that each employee in New York State have a notice of wage rates as required by the New York State Labor Law," Gutstein says. "Certain healthcare employees may be unaware of these rules and regulations, which may lead to significant financial liability."

For example, Gutstein explains, it is not uncommon for physicians to start a practice and pay little to no attention to compliance with applicable employment laws. In such situations, a physician may hire an employee, then hire another, and

before the physician realizes, the practice is a thriving business with numerous employees on payroll, he says. While some statutes, like Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, have a requisite number of employees for the laws to apply, the FLSA and its requirements will apply regardless of the number of employees, Gutstein explains.

"Additionally, it is not uncommon for doctors' offices to have extended hours one or multiple evenings during the week to accommodate their patients. In such situations, the extended hours would put a normal 9-to-5 employee over the 40-hour threshold," Gutstein says. "Physicians also may be inclined to compensate their employees on a salary basis and not require their employees to punch in or punch out at the start and end of their shifts."

A common mistake that doctors' offices make is compensating nonexempt employees on a salary basis and opting not to track those nonexempt salaried employees' hours, says **Taylor M. Ferris**, JD, an attorney with Kaufman Dolowich Voluck in Woodbury, NY.

Another common issue that arises in physicians' offices is when a nonexempt employee decides to go into work early or stay late to finish their work. These situations can ultimately create exposure for physicians, she says.

The most important thing risk managers can do to reduce the risk of FLSA violations is to educate themselves on the law and the requirements, Gutstein says.

"Risk managers should also keep and maintain records of employees' hours worked, as well as properly classify their employees as exempt or nonexempt. Risk managers should also be mindful of the intricacies of the New York Labor Law, including the spread of hours requirement, as well as the wage notice and wage statement requirements," he says. "It is also beneficial to review your hiring and compensation policies and update them if necessary." ■

SOURCES

- Amy L. Blaisdell, JD, Officer, Greensfelder, Hemker & Gale, St. Louis. Phone: (314) 516-2642. Email: apb@greensfelder.com.
- Laurel K. Cornell, JD, Partner, Fisher Phillips, Louisville, KY. Phone: (502) 561-3987. Email: lcornell@fisherphillips.com.
- Jennifer L. Curry, JD, Shareholder, Baker Donelson, Baltimore. Phone: (410) 862-1183. Email: jcurry@bakerdonelson.com.
- Taylor M. Ferris, JD, Kaufman Dolowich Voluck, Woodbury, NY. Phone: (516) 283-8706. Email: tferris@kdvlaw.com.
- Stephanie Dodge Gournis, JD, Partner, Drinker Biddle, Chicago. Phone: (312) 569.1327. Email: stephanie.dodgegournis@dbr.com.
- Keith J. Gutstein, JD, Co-Managing Partner, Hirschler, Richmond, VA. Phone: (516) 283-8708. Email: kgutstein@kdvlaw.com.
- Jacqueline C. Hedblom, JD, Partner, Hirschler, Richmond, VA. Phone: (804) 771-9558. Email: jhedblom@hirschlerlaw.com.
- Robert L. Kilroy, JD, Partner, Mirick O'Connell, Westborough, MA. Phone: (508) 860-1464. Email: rkilroy@mirickoconnell.com.

Criminal Charges Can Creep Up on Clinicians, Administrators

Healthcare risk managers must be careful not to risk criminal prosecution of the organization or its members from activities that may seem innocent, legal experts say. Some activities are particularly prone to criminal prosecution if risk managers are unaware of exactly how they are being conducted in the organization.

Although most criminal investigations in the healthcare industry involve companies that were aware of breaking the law and had intent to do so, it is possible for the organization to be drawn into criminal areas by individuals, says **Sarah Hall**, JD, a former federal white-collar crime prosecutor and now senior counsel with the Thompson Hine law firm in Washington, DC. She has extensive experience in prosecuting criminal healthcare fraud.

"An example would be acquiring a physician practice and you do not have good oversight of what these individuals are doing," Hall says. "The organization as a whole may not be willingly and knowingly engaged in criminal fraud, but you could have individuals who are, and that will draw attention from prosecutors."

DOJ Is Watching

The Department of Justice (DOJ) has focused intently on the healthcare industry for several years

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CME/CE QUESTIONS

1. **Why does Jacqueline C. Hedblom, JD, partner with the Hirschler law firm in Richmond, VA, say Fair Labor Standards Act (FLSA) lawsuits are popular with plaintiffs' attorneys?**

   a. The potential recovery is huge.
   b. It is relatively easy to file the lawsuit.
   c. There are so many disgruntled healthcare employees.
   d. There is no statute of limitations for FLSA claims.

2. **How do many healthcare employers run afoul of the FLSA with meal breaks, according to Robert L. Kilroy, JD, partner with the Mirick O'Connell law firm in Westborough, MA?**

   a. Refusing to pay for meal breaks
   b. Using auto-deduct payroll systems that assume the meal break took place
   c. Providing meal breaks that are shorter than the law requires
   d. Not allowing meal breaks for some employees

3. **What does Sarah Hall, JD, senior counsel with the Thompson Hine law firm in Washington, DC, recommend as one possible strategy to avoid robo-signing charges?**

   a. Audits to determine whether a clinician was on site at the time the order was signed
   b. Setting limits for how many prescriptions can be written in one day
   c. Interviewing random employees about signing practices
   d. Forensic analysis of signatures

4. **What is the name of one method suggested by Darrell Ranum, JD, CPHRM, vice president, Department of Patient Safety with The Doctors Company, for improving communication with parents?**

   a. Tell Me More
   b. Ask Me 3
   c. Don't Forget
   d. Write This Down