

WILL 2010 BE A “BOOM” YEAR FOR HEALTHCARE LAWSUITS?

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During the last decade there was an explosion of overtime pay litigation against employers. Attacks on businesses in various industries – including fast-food establishments, banks, retail stores, pharmaceutical sales companies and service providers – awakened employers to the fact that the Fair Labor Standards Act (FLSA), which governs overtime pay, has not kept up with the way businesses operate today. Overtime claims have cost employers billions of dollars in damages during the past several years.

FLSA regulations about what counts as “time worked,” how time must be recorded, and when overtime must be calculated and paid make it difficult for well-meaning employers to fully comply with the law. Managers and supervisors simply do not understand the finer points of the law, and the law does not make sense when applied to the way businesses must operate today.

This is particularly true in the healthcare industry where other requirements involving patient care and accountability clash with tight budgets and the need to limit overtime pay. Also, health care employers are increasingly using new locating and tracking systems (cell phones, GPS devices, electronic access and charting, etc.) making it easier for employees to use those electronic records to claim they were actually working even though the official time record shows that they were not “on the clock.”

CLLOUDS ON THE HORIZON

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Last year we warned of potential dangers associated with meal period policies and on-call practices based on claims filed by employees in the healthcare industry. (See *Those "Bleeping" Beepers*, Healthcare Update, August, 2009), At the end of last year, new warnings sounded claiming that hospitals and other large employers in the healthcare industry are easy targets and will face an increase in overtime claims.

These warnings were based on new claims filed late during 2009 and increased efforts by lawyers seeking to educate and attract employees interested in filing claims (including claims by plaintiffs' law firms that they are "investigating" a number of health care institutions across the country, and need to "look out for" employees who are having their overtime pay rights violated).

Whether the first part of this new decade will see healthcare employers widely targeted for overtime claims remains to be seen. But there is certainly a likelihood of this, particularly for large institutions and those in urban areas, based on several factors.

First, recognize that alleged overtime pay violations can add up quickly and attract interest. In December of 2009, more than 4,000 nurses in Missouri received \$1.7 million for time deducted when they were not fully relieved of duties during meal periods. According to the employer, some nurses answered their phones while on break and did not follow proper procedure to record their time for the interrupted meal periods. Although the total works out to only about \$400 per person, the total reported as \$1.7 million is enough to make headline news and generate widespread interest and awareness.

Second, recognize that plaintiffs' lawyers are on the prowl and know how to reach health care professionals using the media and other available sources (including professional databases containing email and home addresses). Just as advertisements by lawyers targeting other industries appeared in recent years, there are websites and television advertisements now being placed by lawyers targeting healthcare employees and institutions – particularly large institutions and those in concentrated areas where people are easy to reach. There have also been letters from plaintiffs' lawyers mailed individually to professionals, such as registered nurses, informing them that they might be due

overtime pay and inviting them to call or email for a free evaluation.

Third, recognize that the cards are stacked against employers when it comes to overtime claims. It is the employer's duty to make certain there is an accurate record of hours worked and that overtime was properly calculated and paid. Faced with allegations by former employees saying they were forced to work "off-the-clock," missed meal periods, or performed work before or after work hours, it does not matter whether the employee violated policy or was complicit in not properly reporting hours worked – overtime pay is still due. Procedural tactics by experienced plaintiffs' lawyers who are looking for easy money makes defending against such claims difficult and expensive for the employer.

WHAT YOU CAN DO NOW TO LESSEN THE RISK

Given that an increase in overtime actions against healthcare institutions is likely, prudent healthcare employers will want to take the following steps to minimize the risk:

1. Stay aware of what is going on around you.

Just as it is important to train managers and supervisors to be aware and recognize signs of potential union activity, it's important to have them recognize and look for signs of activity or interest in overtime issues in the organization, as well as in the community. Television and radio advertising, emails, letters, websites and other such sources are often an alert employer's first chance to get a head start on a defense. An employer can avoid or minimize liability by taking early steps to derail attempts by lawyers who are trying to create interest by soliciting and unifying current and former employees who they may interest in filing claims.

2. Open the internal lines of communication.

Employers often find that the employees know the rules, but for some reason believe that they are being informally encouraged not to report overtime or not to really follow the rules. In this era of increased efforts by outside parties trying to contact and educate employees about the potential cash windfall they might get from their own failure to report overtime, it is vital that employers communicate internally on a regular basis to make sure that employees hear about the

importance of accurate timekeeping from you rather than from plaintiffs' lawyers.

3. Continue to train and educate workers and management.

The lawyers and others targeting your current and former employees seek to take advantage of your failure to communicate with and educate your employees, supervisors and managers. Don't let them be the ones to educate your employees and managers about what you should have already let them know. Make sure your message does not get lost in routine training sessions or forms to sign – rewrite materials and make certain your employees and managers hear loud and clear from you regularly in training sessions what is expected with regard to FLSA compliance.

4. Review policies and practices to identify danger areas.

Practices such as automatic meal period deductions, restrictive policies regarding on-call or reporting policies, and requirements for pre- or post-shift tasks are key areas of interest for lawyers seeking to identify easy targets. This is because such policies often provide a good basis for claims and serve as a way to identify a group of employees with something in common to form a class for certification because they are all affected by the same policy or practice. Therefore, it is time to review how such policies work and are currently being applied so that you can identify areas of potential risk.

5. Look, Listen and Learn.

When was the last time you, or a member of your human resources team, took a fresh look at how things are really going in specific departments? The principle of "MBWA" (management by wandering around) is particularly useful. Casually visit and hang around in the break areas, and see if you notice that employees are being interrupted during meal periods such that overtime claims could be brought.

Or you may observe other potential problems, and you can then decide the best way to deal with those internally. Also, be available to employees (including all shifts and work areas), listen to what is being said and see what you can learn. This is a great and proactive way to recognize and reduce potential liability.

THE BOTTOM LINE

A warning has been sounded for the healthcare industry – look forward to the possibility of booming overtime claims in this new decade. Get ahead of the game now. Recognize why this is thought likely to occur, and take steps now to make your organization an unattractive target. If you need assistance or have questions about how to engage in the steps suggested above, or wish to learn how to conduct a more comprehensive wage-hour audit, just give us a call.