Shift Worker Rules Warrant Special Attention

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The long-term-care industry depends on shift workers to provide patient care 24 hours per day, seven days per week. But even experienced and sophisticated employers can find the application of state and federal labor and employment laws particularly challenging in a shift-work setting. This article will identify a few common pitfalls and provide strategies for avoiding them.

Calculating Overtime Pay

Most employers are aware that pursuant to the federal Fair Labor Standards Act (FLSA) and many states' laws, nonexempt employees who work more than 40 hours in a given week are entitled to overtime pay at a rate of time-and-one-half of their "regular rate of pay."

A common mistake made by some employers is treating an employee's hourly rate of pay as the "regular rate of pay" and forgetting to include shift differentials or certain bonuses in the calculation of the regular rate of pay, resulting in the improper payment of overtime compensation to some shift workers.

The only remuneration excluded from the regular rate of pay under the FLSA are certain specified types of payments such as discretionary bonuses, gifts, contributions to certain welfare plans, payments made to certain profit-sharing and savings plans, and pay for foregoing holidays and vacations (not for actual hours worked).

As such, nondiscretionary bonuses, such as a flat-fee bonus for treating more patients in a given period than the agreed-upon usual caseload or an attendance bonus, must be included in the regular rate of pay. For employees who work various shifts and have more than one shift differential that applies to their weekly hours worked, the same procedure for calculating the proper base rate of pay for overtime pay applies: add the total remuneration for the week and divide by the number of hours worked.

Exceptions

Of course, employees who are exempt from the overtime requirements of the FLSA, such as a registered nurse (RN) who is paid on a salaried basis of at least $455 per week and whose training and job duties satisfy the test for the FLSA's statutory "Learned Professional Exemption," need not be paid time-and-one-half for hours worked over 40 in a given week. That being said, an employer may provide additional compensation to that employee in the form of shift differentials or bonus pay

for additional hours worked or patients cared for without risk of converting them to hourly nonexempt employees.

According to the FLSA regulations, as long as the worker receives "all or part" of his or her weekly compensation on a salaried basis of at least $455 per week, which amount is not subject to reduction because of variations in the quality or quantity of work performed, the worker is considered to be paid on a "salary basis." The salary provides a floor, not a ceiling, on compensation.

Reasonable Accommodation To Employees With Disabilities

Another sometimes troublesome issue for employers when dealing with shift workers is determining how to properly handle requests for reasonable accommodation from employees with disabilities.

Under the Americans with Disabilities Act and under some states' laws, employees who are "disabled" and present adequate proof, such as a doctor's note validating the limitation even if not the diagnosis, may be entitled to certain changes in their job duties, work environment, or the way things are usually done that allow them an opportunity to continue to perform the essential functions of their job notwithstanding their physical or mental impairment.

These types of changes are referred to as "reasonable accommodations," and it is the employer's duty to provide such accommodation to the employee, absent a showing of undue hardship.

In some instances, provision of a reasonable accommodation may be accomplished without much, if any, hardship to the employer, as demonstrated by the following hypothetical:

A billing specialist who prepares patient bills and submissions to insurance companies and Medicare suffers from diabetes and requests to take several brief 15-minute breaks during the day to check her blood sugar and, if necessary, eat a snack to regulate her blood sugar levels.

Even though company policy provides that billing specialists are only entitled to one 15-minute break in the morning and one 15-minute break in the afternoon, in addition to their lunch hour, it may be considered a "reasonable accommodation" to permit the additional breaks for the disabled employee, even though other employees who are not disabled are not allowed the same privileges.

Complexities Exist

But providing reasonable accommodation to shift workers can often raise more complex issues. Here's a hypothetical:

An RN who regularly works the night shift (11 p.m. to 7 a.m.) three days per week advises her employer that she suffers from seizure disorder, and her physician has provided a note indicating that it is medically necessary for her to avoid overnight or rotating shifts and to work only the day shift (7 a.m. to 3 p.m.).

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Shift assignments at the facility, however, are governed by a collective bargaining agreement that gives preference in order of seniority, and this RN is the most junior member of the staff.

Must you grant the disabled RN the day-shift position as an accommodation to her disability even if it requires displacing a more senior RN?

The short answer is probably not, as the courts and the U.S. Equal Employment Opportunity Commission have stated that reassigning a disabled employee to a position to which another employee has rights under a seniority system could be considered an "undue hardship" and thus may not be a "reasonable accommodation."

But if the disabled RN can show that exceptions to the seniority system have been made in other circumstances, the employer's obligations may not be so clear. Thus, to be prudent don't apply a blanket rule. Instead, explore the particular circumstances of each situation to determine if a reasonable accommodation can be made.

Contract Worker Situations

Healthcare providers should also be aware that even when the employee is a temporary or contract worker supplied by a third-party staffing company, the healthcare provider will often be considered a joint employer obligated to offer reasonable accommodation in appropriate circumstances.

The fact that the worker was retained through a staffing company likely will not relieve the healthcare provider of the duty to comply with state and federal laws concerning provision of reasonable accommodation to disabled employees.

The management of an organization that operates 24/7 through the use of shift workers presents challenging issues not faced by 9-to-5 businesses. But with careful oversight you can create rewarding opportunities for your employees while providing valuable and much needed assistance to the patients and clients you serve.

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