

# 7 BIGGEST WAGE AND HOUR LANDMINES FOR HEALTHCARE EMPLOYERS – AND YOUR BLUEPRINT FOR AVOIDING THEM

Insights

Apr 14, 2022

For years now, healthcare employers have been particularly attractive targets when it comes to wage and hour compliance actions. Not only is the industry one of the largest in the country, there are some issues unique to healthcare that make it challenging to stay in 100% compliance – and therefore render it prone to costly missteps. This Insight will provide a list of the seven biggest wage and hour landmines for healthcare employers and then offer a suggested blueprint for avoiding them.

## Why is Compliance So Important?

Before we examine the landmines to avoid, it's important to understand the ramifications of noncompliance. First and foremost, class action and collective action lawsuits have been a popular tool of plaintiff's lawyers – particularly when aimed at healthcare employers. When sued by employees, employers face the prospect of paying back wages, liquidated damages up to 100% of the amount of back wages, and the employees' attorney's fees and costs. The potential liability for lawsuits seeking minimum wages or overtime pay can quickly skyrocket when many employees are drawn into one lawsuit and these damages are multiplied many times over.

In addition to the risks presented by costly private lawsuits, the federal government has been very active in investigating healthcare employers for wage and hour compliance under the Fair Labor Standards Act (FLSA). The U.S. Department of Labor's Wage and Hour Division has targeted healthcare as a "high violation industry," and in 2021 conducted 1,194

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investigations of healthcare employers. Following an investigation, the Department of Labor can file a lawsuit in federal court if an employer does not agree to pay the back wages and liquidated damages demanded. Unlike private litigants, the Department of Labor does not need to seek the certification of a collective action. Instead, it can, at its own discretion, file a lawsuit covering a large population of employees. In addition to obtaining the same damages as employees in a private lawsuit, the Department of Labor can also impose civil money penalties.

## **7 Biggest Wage and Hour Landmines**

While there are a myriad of potential wage and hour compliance challenges that a healthcare employer might face, below is list of the seven most common issues that healthcare employers encounter.

### **1. *Misclassification of employees as exempt from minimum wage and overtime requirements***

Healthcare employers may assume that employees who have completed some level of post-secondary education and have professional certifications are “white-collar” workers exempt from the minimum wage and overtime requirements. Whether an employee meets one of the exemptions, however, requires a detailed analysis of each employee’s work duties, education, and training. For example, a registered nurse who is paid a salary of \$684 per week and consistently exercises professional judgment in their work duties may be exempt. However, other registered nurses may not be exempt based on the work duties that they normally perform.

### **2. *Misclassification of employees as independent contractors***

The issuance of an IRS 1099 form to an employee does not determine, in and of itself, that an employee is an independent contractor. The FLSA has an expansive definition of who is an employee. Government investigators and the courts will closely analyze each worker’s conditions of employment to evaluate whether they are truly independent or are employees under the control of the employer. The Department of Labor’s Wage and Hour Division has focused heavily on this issue in the recent past, particularly in relation to the home health care industry.

### **3. *Improper rounding of employee time entries***

Under the FLSA, an employer is permitted to round its employee's time entries. In fact, it is a fairly common practice for employers to round employee time entries to the nearest five minutes, tenth of an hour, or quarter of an hour. However, the Department of Labor takes the position that the effect of the rounding must be neutral and not result in employees being prevented from receiving compensation for all time worked when looked at over a period of time. Employers who round employee entries but do not monitor the effect of the rounding could expose themselves to a wage and hour claim.

### **4. *Ignoring travel time***

Many healthcare employers have employees who travel to multiple locations as part of their work duties. This travel may entail, for example, going from one medical facility to another, or visiting patients at home. Travel from one work location to another during the workday is typically considered a compensable work activity, meaning that employers must pay for this time and count it as work hours for determining the employee's eligibility for overtime pay. Ordinary travel from home to work before the beginning of the day, and ordinary travel from work back to home after the workday, however, are not considered compensable work time.

### **5. *Permitting work during meal time and other breaks***

Another common issue is when non-exempt employees perform work during their unpaid meal or other breaks. It is not enough for an employer to have a policy stating that employees are not to perform work over their unpaid breaks. Employers can be found responsible for employee work performed during unpaid breaks if it knew or should have known that employees were performing the work.

### **6. *Not compensating for on-call time***

An employer may be required to compensate employees for the time that they are on call, depending on how free the employees are to use the on-call time. If an employer requires an employee to remain on its premises, or so close to its premises that the employee cannot use the time for the employee's own purposes, the on-call time will likely be considered compensable work time.

## **7. *Not including all required earnings in the “regular rate” for the calculation of the overtime premium***

Employees in the healthcare industry are often compensated with a variety of bonuses such as shift differentials, supplemental shift bonuses, and retention bonuses. It is often the case that employers must include the payment of these bonuses in the regular rate of pay used to calculate overtime pay. Even where an employer pay overtime, it can be liable for a substantial amount of back pay where bonuses were improperly left out of the regular rate of pay.

### **What Should Healthcare Employers Do?**

Now that you have a better appreciation of the most common risks, what are some best practices you should undertake to minimize your chances of facing a wage and hour dispute?

- It is critical to **conduct periodic internal audits** of your wage and hour practices. These audits should include a review of exempt/non-exempt classifications, independent contractor classifications, timekeeping and time-rounding practices, and whether employees are performing work during any unpaid period such as meal and rest breaks. The audits should also make sure that all required bonus payments are included in the regular rate used to calculate overtime. It is best practice to have your internal audits conducted under the supervision of an attorney, either in-house or outside counsel.
- You should **understand that the government’s investigators have the legal authority to investigate** your wage and hour practices. The government will request that you promptly produce documents including your payroll and timeclock records, employee contact information, information concerning employee exemption classifications, 1099 forms, and job descriptions for their review. The government has the power to subpoena your records and to issue subpoenas commanding the testimony under oath of the employer’s owners and managers.
- You should **prepare now for a possible investigation**. The first priority is to ensure that you are complying with the law. You also want to have a plan in place for handling a wage and hour investigation. This includes having a plan

for who will attend the opening and closing conferences, who will attend any on-site visits, and who will be responsible for gathering and producing documents to the investigators.

- If the government or a private attorney makes a demand for back wages, you must **act quickly and decisively** to evaluate the merits of the demand. In particular, when the U.S. DOL demands the payment of back wages, it often gives the employer a short period of time to respond before requesting that the Department's Solicitor's Office to file a lawsuit. Employers must be prepared in advance to evaluate and respond to these demands.

## Conclusion

We will monitor the situation and provide updates as developments occur, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in our [Healthcare Industry Team](#), or any attorney in our [Wage and Hour Practice Group](#).