

6 WAGE AND HOUR COMPLIANCE TIPS FOR HEALTHCARE EMPLOYERS

Insights

Dec 1, 2022

No employer wants to be embroiled in litigation alleging wage and hour violations or find themselves the subject of an investigation by the U.S. Department of Labor (DOL) over pay practices. But employers in the healthcare industry have long faced particular scrutiny from the DOL based on compensation issues that are unique to the industry – especially when it comes to home health aides. In fact, the DOL identified healthcare as a “low wage, high violation” industry and collected nearly \$14 million in backpay for employees in FY 2021 — an amount surpassed only in the construction and food services industries. So, what practical steps can your healthcare organization take to reduce your risk and keep compliant with federal, state, and local wage and hour rules? Fisher Phillips Partner Kathleen Caminiti provided the following six compliance tips for healthcare employers while speaking on a panel at the American Bar Association’s 16th Annual Labor and Employment Law Conference on November 11.

1. Review Worker Classification

Employers may be tempted to designate healthcare workers as independent contractors rather than employees, but simply providing an IRS Form 1099 to workers (instead of a W-4) doesn’t mean they are properly classified as independent contractors. Under [federal regulations](#), employers should primarily consider the nature of the work, the worker’s opportunity for profit or loss, and the level of control over key aspects of the work. For example, who sets the schedule and pay rates, and what aspects of the work can be negotiated? You should also note that some states, such as [California](#), [Massachusetts](#), and [New Jersey](#), have

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stricter rules than federal law when it comes to independent contractor classification. So, you may want to review your current worker classifications to ensure they are compliant with the latest rules in your jurisdiction.

2. Ensure Overtime is Properly Calculated

Caminiti identified miscalculating the “regular rate of pay” as a hot issue for non-exempt workers in healthcare. Under the Fair Labor Standards Act (FLSA), non-exempt workers must be paid 1.5 times their “regular rate of pay” for all hours worked beyond 40 in a workweek. While the “regular rate” excludes some compensation — such as health insurance and certain paid time off and discretionary bonuses — it includes many other forms of pay, including most bonuses and shift differentials, as well as on-call, longevity, hero, and hazard pay. Failing to include these forms of pay in the regular rate can lead to claims of unpaid overtime.

3. Pay for Travel During Shifts

Many healthcare workers travel during their shift from client to client or facility to facility — and that time is generally compensable, Caminiti said. Thus, you need to ensure employees are paid for such time and that overtime pay is also calculated accordingly. You should note, however, that the time an employee spends commuting from home to the first worksite of the day and back home at the end of the day generally is not compensable.

4. Beware of Interrupting Breaks

Many healthcare workers say they never get to sit down, Caminiti observed. But you should ensure that non-exempt workers aren't performing work during their unpaid meal and rest breaks. Additionally, some states — such as California, Colorado, and New York — have specific laws on meal and rest breaks. So, you should make sure you are following the rules in your jurisdictions.

Caminiti noted that auto-deducting time for meal breaks could be problematic because the employer may need to be able to prove those breaks were taken. Thus, it's a good practice to have employees clock in and out for unpaid breaks.

5. Pay for Time Spent in Training and Meetings

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Time spent at work for the benefit of the employer is compensable. This includes time employees spend onboarding and in training sessions and meetings. Be sure that all work time is captured appropriately for non-exempt employees when they are engaged in these activities, Caminiti counselled, and be sure to train managers on proper timekeeping for such workers.

6. Don't Retaliate Against Workers for Bringing Complaints

Notably, Solicitor of Labor Seema Nanda said earlier this year that one of her top priorities is "combatting retaliation through robust enforcement." This highlights the importance of ensuring your managers know that it's unlawful to fire an employee or take other adverse action against them because they complained about a perceived workplace violation.

How Can You Prepare for a DOL Investigation?

Following the steps identified above and conducting a wage and hour audit can help you prepare for a DOL investigation. You should understand that the DOL's investigators have the legal authority to investigate your wage and hour practices. The government could 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 want to conclude a DOL audit as quickly and favorably as possible, Caminiti said. The best way to do that is to cooperate with reasonable requests and try to get to the heart of the matter and demonstrate compliance. Gather documents immediately and put your best foot forward.

Furthermore, you'll want to engage legal counsel early so you have an attorney who is well versed in wage and hour law to help you through the process and quickly address any potential issues. Caminiti cautioned that it is important to prepare for the audit under the protection of the attorney-client privilege.

Conclusion

We will continue to monitor wage and hour developments and provide updates, 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 on our [Healthcare Industry Team](#), or any attorney in our [Wage and Hour Practice Group](#).