

Health Care Providers Beware! Your Wage/Hour Practices Are Under Scrutiny

By: Mark D. Nelson and Stephanie Dodge Gournis

Are you in compliance with the Fair Labor Standards Act? According to the U.S. Department of Labor's Wage and Hour Division (DOL), two out of three health care employers audited in New York **are not in compliance**. DOL has just announced an "initiative" to promote FLSA compliance on a statewide basis; it has already begun in New York. DOL audits of the health care industry in other states are certain.

Hospitals and other health care providers take note - if your payroll system automatically deducts meal periods from employees, particularly registered nurses, you are at risk. Not only is the DOL stepping up enforcement proceedings, but class action plaintiff lawyers are sending mailings to the homes of registered nurses across the country trying to find hospitals to sue for wage/hour violations. Whether it is a class action lawsuit or a DOL audit, the potential liability is hundreds of thousands of dollars or more in back pay and penalties.

Recently, more than 4,000 nurses in Missouri received more than \$1.7 million in back overtime pay following a U.S. Department of Labor determination that they were not paid for mealtimes during which they worked. DOL investigators found that nurses at seven SSM Health Care facilities were owed money because the health care system's timekeeping system automatically deducted time for meal periods whether or not the employees were fully relieved of their duties. SSM Healthcare has almost 23,000 employees and 20 hospitals in Wisconsin, Illinois, Missouri and Oklahoma.

Some of SSM's meal period violations were alleged to have occurred when nursing staff carried hospital phones or pagers during meal periods and accepted work-related calls. The DOL rejected SSM's argument it should not be held liable because the nurses violated SSM policy prohibiting nurses from carrying hospital phones or pagers during meal breaks. SSM's assertion that nurses failed to report to their supervisors that they had performed work during their meal periods also failed to persuade the DOL.

SSM is only the most recent health care system to have its pay practices challenged. Last year, Partners HealthCare System agreed to pay \$2.7 million to settle claims that it failed to aggregate, for overtime purposes, the hours of employees who worked for more than

one facility within its system network. Also last year, several major health systems in Pittsburgh, Pa., including West Penn Allegheny Health System Inc. and Pittsburgh Mercy Health System Inc., were hit with class action lawsuits alleging violations of the Fair Labor Standards Act. These allegations included:

- > Computerized time systems automatically deducted meal periods even when employees worked during meal breaks;
- > Employees worked before and after their shifts without being paid properly;
- > Employees were not paid for attending training sessions.

As evident in the Pittsburgh cases, the potential plaintiff classes in wage and hour lawsuits can be significant. The class action against West Penn Allegheny suit could have 12,000 plaintiffs and the Pittsburgh Mercy class size is estimated to be 4,000. The damages could run into tens of millions of dollars.

While the claims listed above highlight some of the most common types of FLSA violations in health care, they are not the only ones. Other common wage and hour violations occurring in hospitals today include:

- > Failure to properly pay employees for off-premises work, including time spent answering phone calls and e-mails;
- > Failure to ensure payroll software, after customization, complies with state and federal wage/hour laws;
- > Failure to include incentive pay, bonuses and shift differential in calculating overtime;
- > Improper classification and/or deductions for exempt employees;
- > Improper “pushing” and “pulling” of hours that cross over workdays and/or workweeks.

To ensure compliance with federal wage and hours laws, it is *not enough* for health care employers to review compensation policies and payroll procedures. Many violations arise from failures in policy administration and the day-to-day practices of managers and non-compliant employees. There is no question that wage/hour inspections and enforcement will increase under new Secretary of Labor, Hilda Solis. Health care providers should ensure that their pay practices and policies are in complete compliance with the Fair Labor Standards Act and applicable state laws, and that supervisors and managers fully understand how to properly apply pay policies.

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Should you require further assistance with regard to the information set forth in this alert, please contact any partner in Drinker Biddle's Labor & Employment Practice Group.

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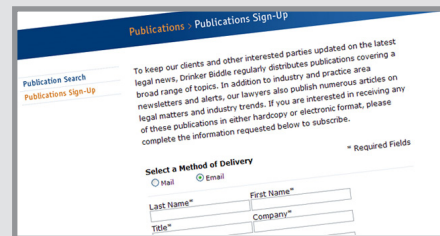
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