

### **THE DEPARTMENT OF LABOR'S WAGE AND HOUR COMPLIANCE STRATEGY AND WHAT IT MEANS FOR HEALTHCARE EMPLOYERS**

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#### **Abstract:**

The Department of Labor is more aggressively enforcing various compliance programs, including wage and hour rules under the Fair Labor Standards Act. Gournis offers proactive steps healthcare employers should take in order to help protect themselves from state and federal enforcement actions or class-action lawsuits.

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In the spring of 2010, the Department of Labor (DOL) published its 2010 Regulatory Agenda. The document detailed the agency's regulatory goals, which it hopes to achieve by the end of April 2011. This Regulatory Agenda and other non-regulatory initiatives are part of the DOL's new "Plan/Prevent/Protect" compliance program that requires employers to "find and fix" their federal law violations before DOL investigators come knocking at the door.

#### **Plan/Prevent/Protect**

The "Plan/Prevent/Protect" program is intended to replace what the DOL describes as the "catch me if you can" system previously adopted by employers. The DOL's new enforcement strategy pressures employers "to assemble plans, create processes, and designate people charged with achieving compliance." Employers will be expected to develop self-audit programs, compliance action plans and follow-up analyses as part of their on-going compliance, with the understanding that the "the burden is on [employers] to obey the law."

While the "Plan/Prevent/Protect" program reaches all DOL enforcement agencies, arguably the greatest impact may be realized in the changes to compliance enforcement by the DOL's Wage and Hour Division (WHD).

The DOL hired 250 new investigators to conduct WHD compliance audits in 2009. WHD expects to receive an estimated \$12 million increase for compliance efforts and hire another 100 investigators by the end of fiscal year 2011. The WHD also is spearheading the DOL's "We Can Help" employee promotional campaign. This initiative is designed both to increase employee awareness of federal wage law and encourage reporting of noncompliant employers to the DOL.

In turn, the WHD promises to get tough on employers found in violation of federal wage and hour law. The agency warns that "[c]ompliance will be non-negotiable" under its "Plan/Prevent/Protect" program and employers should expect more public adverse determinations seeking the maximum in penalties in DOL-enforced settlements of violations.

### **The Future of WHD Compliance Audits**

At a recent Stakeholders Forum, WHD representatives warned that the agency would broaden the scope of its compliance audits to reach the broadest possible determination as to employer liability under the Fair Labor Standards Act (FLSA). WHD investigators will not necessarily confine their compliance audits to single employer sites or single subject matters. Instead, WHD plans to pursue corporate-wide compliance with investigations reaching out to corporate affiliates and addressing issues beyond those raised by an underlying complaint. WHD also threatens to combine enforcement efforts with other federal agencies, such as the Internal Review Service, to promote greater compliance with federal law.

WHD representatives say the agency may eliminate offers of “safe harbor” to employers seeking to correct past violations on a voluntary basis. WHD also may withdraw assistance to employers in supervising their voluntary distribution of back wages resulting from wage and hour violations. WHD is considering revising its current waiver and release form (Form 58) to eliminate employee waivers of private claims in exchange for settlement and receipt of compliance distributions.

### **New Industry-Focus on Enforcement**

With its new compliance strategy, WHD plans to leverage its limited resources by targeting employers in particular industries where violations are most likely to occur. This should come as no surprise to healthcare employers who already were experiencing a 30 percent increase in wage and hour compliance audits even before Secretary of Labor Hilda Solis took reign of the DOL and promised to step-up enforcement.

Earlier this year the New York State Department of Labor announced a statewide initiative to promote FLSA compliance in the healthcare industry, after a study revealed that two out of three healthcare employers in the state were noncompliant with wage and hour laws. Increased compliance enforcement of healthcare employers in other states is imminent.

Long before the WHD announced its “We Can Help” campaign, class-action plaintiff’s attorneys were blanketing healthcare employees with mailings offering free legal advice to determine whether employers might be violating state and federal wage laws. Class action lawsuits pop up most every day, as healthcare employers make headlines by paying multi-million dollars settlements to resolve wage and hour claims. In June 2010, four Boston-area hospitals reportedly agreed to pay \$8.5 million to settle a class-action lawsuit alleging failure to pay employees for work during breaks while employees were off-the-clock. These hospitals followed healthcare employers such as SSM Healthcare, Tenet Health and Partners Healthcare System, which last year paid millions to settle similar employee wage and hours claims.

### **Healthcare Employer Compliance**

So what should healthcare employers be doing to “Plan/Protect/Prevent” and otherwise avoid wage and hour violations from occurring in their workplaces? The DOL’s regulatory and compliance agenda provides a road map for healthcare employers to follow in developing their wage and hour compliance programs.

### **More Than Just a Title**

The WHD will continue to pursue its two-year “Misclassification Initiative” for addressing misclassification of workers. The DOL also is considering a proposed regulation that would require employers to conduct individual classification analyses for workers considered exempt from minimum wage and overtime provisions under the FLSA. Under the proposed regulation employers would have to

provide each worker with a written summary of classification analysis and retain copies of such analyses for review by WHD enforcement personnel upon request.

In advance of such new record keeping requirements, healthcare employers should be revisiting current status designations for all exempt employees and independent contractors. WHD will be looking for more than just whether an exempt employee is paid on a salaried basis or whether a contract designates a worker as an independent contractor. In compliance audits expect investigators to look for hard documentation and evidence of day-to-day work functions supporting the exemption status. A word of warning to employers: If you haven't conducted an exempt status audit since 2004 or reevaluated exemption status following substantial job restructurings and/or workforce reductions, make this a top priority.

Employers also should review job functions and responsibilities for volunteer workers who perform work traditionally and/or currently performed by paid employees on other shifts. While the DOL typically has ignored volunteer healthcare workers in compliance audits, employers can expect greater scrutiny in this area.

### **The Companies We Keep**

Healthcare employers can expect WHD compliance audits to expand across multiple corporate affiliates. WHD will be looking for noncompliant practices common to multiple facilities within the same corporate family. This provides additional incentive for multi-employer systems to ensure *all* of their corporate-affiliates are included in internal compliance audits and otherwise comport wage and hour practices with state and federal law.

Healthcare systems also should ensure their payroll systems capture and appropriately aggregate time worked by employees performing service at two or more corporate affiliates within a single work week. Nonexempt employees should be paid overtime for all aggregated worked hours in excess of 40 hours in a single work week. This includes employees working for affiliates under the same corporate umbrella and all other entities sharing at least a 50 percent common business ownership. Last year Partners HealthCare Systems paid more than \$2.7 million to employees denied overtime when working more than 40 hours at multiple facilities throughout the corporate system. Other healthcare systems should expect more claims to follow.

### **Beyond Meal Periods**

Finally, both WHD and class-action plaintiff attorneys continue to focus their efforts in exposing healthcare employers for noncompliant wage and hour practices. Automatic deductions for missed meal periods continue to be the focus of DOL audits and class action lawsuits. But other top areas of healthcare employer vulnerability include:

- Failing to track off-the-clock work performed outside an employee's regular shift, including time spent at training programs and any homework, such as answering phone calls and emails
- Not including incentive pay, bonuses and shift differentials in calculating overtime and/or not appropriately allocating such incentives across the time periods in which they are earned
- Improper "pushing" and "pulling" of hours that cross over workdays and/or workweeks, such as allocating all worked hours to the workday in which the employee either clocks-in or works the most hours
- Improper payment for time spent by employees traveling between facility sites or patient homes
- Improper deductions for exempt employees, such as for partial day absences or full day absences resulting from low census and/or employer-directed call-offs

Every healthcare employer should consider an internal compliance audit to assess basic vulnerabilities and take immediate action to correct any identified noncompliant practices. Also important is the education of front-line managers charged with the day-to-day enforcement of the employer's wage and hour policies.