

CLIENT ALERT

September 2010

Wage and Hour Concerns for Healthcare Employers

Reflecting a renewed effort to identify wage and hour violations, the U.S. Department of Labor (“DOL”) hired 250 new wage and hour investigators, an increase of one-third. High on the list of investigation targets (and in the line of sight of wage-and-hour plaintiffs’ attorneys): the healthcare industry.

The DOL has announced an “initiative” to promote Fair Labor Standards Act (“FLSA”) compliance on a statewide basis. In its recent audit of the New York healthcare industry, for example, the DOL found *two out of three* audited healthcare employers were not in compliance with wage and hour laws. Audits in other states are already underway.

Additionally, attorneys are targeting registered nurses with mail solicitations, trying to find hospitals to sue for wage and hour violations. A proposed \$7.25 million class action settlement is pending against a hospital in California, arising out of overtime denied to medical workers allegedly misclassified as exempt. A Boston-based healthcare system agreed to pay 700 employees more than \$2.7 million in overtime back wages. These are just of many cases involving wage and hour claims filed against healthcare employers across the country.

Wage and hour violations largely stem from two issues: (1) the misclassification on non-exempt workers as exempt; and (2) the misclassification of employees as independent contractors.

Exempt or Non-Exempt?

Employers must be extremely careful when classifying workers as “exempt” for purposes of the FLSA’s overtime requirements. Under the FLSA, all non-exempt employees are to be paid at time and a half for all work performed beyond 40 hours in a work week. However,

certain *bona fide* executive, administrative, professional, outside sales employees, computer professionals, or other highly-paid employees are exempted from the FLSA's overtime requirements by virtue of the nature of their job responsibilities. Exempt employees are those who are salaried, often have managerial responsibilities or specialized or technical knowledge, and are expected to exercise discretion and make independent judgments. Exempt employees are not eligible to earn overtime should they work more than 40 hours in a work week.

It should be noted that simply compensating an employee by way of salary rather than an hourly wage does not make them an exempt employee. Further, the employee's job title does not determine his/her exempt status. Rather, in order for an exemption to apply, an employee's specific job duties and salary must meet each of the requirements of the exemption under the FLSA (as well as the applicable state wage and hour laws). Thus, an analysis must be conducted for each worker to determine if he/she meets all of the requirements of the specific exemption (executive, administrative, professional, outside sales employee or computer professional) to be properly classified as exempt.

An employer's intentional or unintentional misclassification of an employee as exempt can result in wage and hour penalties and back pay liability. Given the increased scrutiny of the misclassification of workers as exempt, especially in the healthcare industry, employers must exercise extreme caution and diligence when classifying workers for purposes of overtime eligibility.

Employee or Independent Contractor?

To determine whether a worker is an employee or an independent contractor, employers must assess the following issues regarding their degree of control over the worker: (1) behavioral control; (2) financial control; and (3) the type of relationship. If the employer has a right to direct and control how the worker performs his work ("behavioral control"), including the time, location, and method of the work, the worker is more likely to be an employee than an independent contractor. If the worker has financial investment in his/her tools or equipment, is paid by the job rather than by the hour, or has the ability to realize a profit or a loss on his work, the worker has financial control over his/her work, and is more likely to be an independent contractor. Finally, the way the parties define the relationship can influence whether the worker

is an employee or an independent contractor. Employers should be aware, however, that the name they assign the relationship is not outcome-determinative, and factors such as whether the employer provides the worker employee-type benefits, whether the business and the worker expect their relationship to continue indefinitely, and the extent to which the services performed by the worker are a key aspect of the regular business of the company or are similar to services performed by employees weigh heavily in the analysis. No single factor controls the analysis, which must be conducted as to each worker.

What Can Employers Do to Ensure Compliance?

It is no longer enough for employers to review employee classification and compensation policies. Violations can arise from well-intentioned, but misinformed managers and non-compliant employees. Given the DOL and plaintiffs' attorneys heightened focus on wage and hour violations in the healthcare industry, healthcare employers should ensure that their pay practices and policies are in complete compliance with the FLSA as well as the New Jersey wage and hour laws. Further healthcare employers are strongly encouraged to carefully analyze each new hire's job duties to determine if he/she can properly be classified as an exempt employee or an independent contractor, and should also conduct a self-audit to ensure that all current workers are properly classified.

Our team of Labor & Employment attorneys can assist your organization in conducting a self-audit of your policies, procedures and worker classifications to safeguard against misclassifying employees as exempt or workers as independent contractors. For more information about wage and hour compliance, please contact a partner in our Labor & Employment Law Practice Group: Tricia B. O'Reilly, Esq., Peter J. Pizzi, Esq., M. Trevor Lyons, Esq., or Michael A. Shadiack, Esq. at (973) 535-0500.