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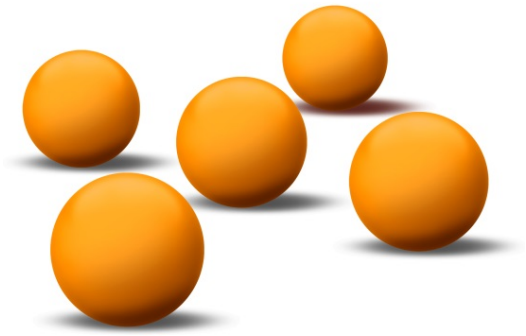

Fair Warning:

10 Common Mistakes to Avoid under the Fair Labor Standards Act

By Ashley Hattaway and Sam Grimes

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Most healthcare employers have probably heard of the Fair Labor Standards Act ("FLSA") and most probably think it is pretty simple. Doesn't that law just deal with prohibiting child labor and paying overtime wages to hourly employees? Plaintiffs' attorneys across the country know of the nuanced ways to bring suit under the FLSA, and in the last few years, FLSA cases have skyrocketed. In particular, overtime collective actions that can involve hundreds or thousands of employees are being filed frequently. These collective actions are attractive to plaintiffs' attorneys because most employees are eligible, the cases can be difficult to get dismissed before trial, and employers have been slow to address some of the issues that are the subject of these lawsuits. To help ensure that your healthcare organization complies with the FLSA, here are ten common mistakes to avoid:

1) IMPROPERLY CLASSIFYING EMPLOYEES AS EXEMPT

Many employers believe that if an employee is salaried, then he or she need not be paid overtime. Executive, administrative, and professional employees (among others) can all theoretically be exempt from the FLSA, but salary is only one element to those exemptions. For the professional employee exemption, for instance, the FLSA generally requires: 1) knowledge of an advanced type, 2) in a field of science or learning, 3) customarily acquired by a prolonged course of specialized intellectual instruction. To be certain an employee is exempt from overtime pay, a careful study of facts regarding the employee's job position and the legal requirements should be conducted.

2) DOCKING PAY OF EXEMPT EMPLOYEES

If an employee meets one of the overtime exemptions of the FLSA, an employer generally cannot deduct from the employee's predetermined salary without destroying the exemption except in certain circumstances specified by law. Federal regulations allow employers to deduct for certain situations including full day personal leave (other than sickness or disability); full day leave for sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees or for temporary military duty pay; discipline for infractions of safety rules of major significance; disciplinary suspensions for full days for workplace conduct rule infractions; in the employee's initial or terminal week of employment if the employee does not work a full week; and Family and Medical Leave Act ("FMLA") absences. If an exempt employee's pay is deducted improperly, the employee will be considered non-exempt and may be due overtime pay.

3) NOT PAYING FOR PRE AND POST SHIFT ACTIVITIES

In certain cases, employees' preparatory and concluding activities count toward hours worked, leaving an unknowing employer in violation of the law. Generally, activities such as changing clothes or equipment should be compensated if the activities are necessary for the employee's job. Employers should know the rules on pre and post shift activities and compensate employees accordingly.

4) BREAKING THE BREAK TIME RULES

Although employees need not be paid for "bona fide" lunch or meal breaks lasting thirty minutes or more, such breaks must be uninterrupted by any active or inactive work. For example, if meal periods are often interrupted by calls, the entire time can be considered on the clock under the FLSA. Furthermore, although the FLSA does not require employers to grant rest periods, if an employer does grant breaks, then shorter coffee or rest breaks must count toward hours worked.

5) INCORRECTLY ROUNDING EMPLOYEE WORK TIME

Generally, rounding time to the nearest quarter hour is permissible but not if an employee is disadvantaged by the rounding practice. For example, if the employer rounds employee time from one to seven minutes down (and does not count the time as time worked) it should round employee time from eight to fourteen minutes up (and count the time as a quarter hour of work time).

6) NOT MAKING GOOD USE OF THE TIME CLOCK

If significant differences exist between the time clock and hours paid to the employee, plaintiffs' attorneys will likely challenge the accuracy of the employer's records. Employers should set out express rules about clocking in and out and make sure that employees and supervisors know that employees should not work off the clock. Employers also should let employees know that if their hours worked do not match their hours paid, they should report the discrepancy to the employer.

7) NOT PAYING FOR TRAINING AND REQUIRED MEETINGS OR EVENTS

Employers must usually pay employees for time spent attending employer-sponsored training, meetings, and events. A narrow exception exists to this general rule if 1) attendance is outside regular working hours, 2) attendance is voluntary, 3) the training or meeting is not directly related to the employee's job, and 4) the employee does not perform any productive work during the attendance.

8) NOT COMPLYING WITH RECORDKEEPING REQUIREMENTS

Employers need to make, keep, and preserve records of employees' wages and hours. Although the law does not require the records be kept in any specific format, the employer must be

ready to convert the data into a form that can be inspected within seventy-two hours. Twelve records are mandated, ranging from the employees' names and addresses to details of the employees' compensation structures.

9) NOT UNDERSTANDING THE SERIOUSNESS OF COLLECTIVE ACTIONS

Employers need to know that a plaintiff can file on behalf of all similarly situated individuals, and during discovery, seek the names and addresses of such employees. Although punitive damages do not exist within FLSA collective actions, other forms of damages including back pay, interest, liquidated damages, and attorney's fees can be collected. These damages quickly add up if multiple employees bring suit under a collective action.

10) NOT TAKING PREVENTATIVE MEASURES

A careful audit of wage and hour practices should be an employer's first step to avoiding common FLSA mistakes. When changes need to be made to employment policies, language should be crafted to anticipate potential FLSA claims and guard against violations of law. Proper planning now can prevent years of costly litigation in the future.

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