

Healthcare Employment Law IN Brief

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Area of Concern: Fair Labor Standards Act (“FLSA”) Compliance

Potential Liability: Double damages; Plaintiffs’ costs and attorneys’ fees; Civil Money Penalties; Criminal

Personal Liability: CEOs, CFOs, COOs, HR, others may be personally liable for violations. Often, this is not insured at the corporate or personal level.

False Sense of Security: Payroll system implemented by third party—We have seen mistakes.

Multiple forms of compensation, varied schedules, and several positions with low paid wages make healthcare organizations prime targets for FLSA enforcement by the U.S. Department of Labor and for private lawsuits. Failure to comply with the FLSA often results from system-wide problems rather than individual mistakes. **System-wide problems result in class actions.**

Damages add up quickly. Consider how an underpayment of \$1/day due to a mistake in including a shift differential or call pay into the calculation of the regular rate for overtime purposes for each of 500 employees can result in a million dollar claim:

- \$1/day x 500 employees = \$500/day
- Assuming two year statute of limitations, \$500 x 730 days = \$365,000
- \$365,000 x 2 (liquidated damages) = \$730,000
- Add your defense fees and costs and the costs and attorneys’ fees of the successful plaintiff(s), and you likely are at or in excess of \$1 Million.

Individuals responsible for running your organization and/or making decisions about employee compensation may be held personally liable for violations of the FLSA. You cannot simply resign or shut down your practice to escape judgment. We are seeing an increase in claims against individuals. The worst part – **many insurance policies expressly exclude wage and hour claims from coverage.**

To appreciate how “hot” this area of litigation is, see www.hospitalovertime.com and learn about one law firm’s class action activity with respect to hospitals.

Consider auditing your FLSA compliance. A good start is to answer the following questions:

- Are you properly classifying employees as “exempt”? Remember, **the presumption is non-exempt**; and the employer has the burden of proof.
- Are you paying overtime to non-exempt employees working two or more jobs when total hours worked at all jobs exceeds 40 (or 8/80)?
- Are you including in your calculation of the regular rate payments such as: retention and attendance bonuses; shift differentials; and on-call pay?
- If you allow employees to round work time (for example, to the nearest quarter hour) are you rounding up as well as down?
- Do your managers know when to treat travel time, attendance at training sessions, on-call time, meal time, and employees working outside of scheduled hours (for example, a nurse staying late to finish charting or an employee working on a project at home) as “hours worked”?
- Do you know when allowing an exempt employee to work by blackberry or remote access e-mail may convert otherwise unpaid time into paid time?
- Are your pay practices consistent with your definition of the FLSA “workweek” (for example, if you state the “workweek” ends at 11:59p Sat for a 7p-7a employee, are you counting hours worked from 7p-11:59p Sat in one workweek and from 12:00a-7a Sun in the following workweek, or are you counting them all as hours worked Sat)?
- Is your organization a “joint employer” for FLSA purposes with respect to agency employees?

Failure to comply with the FLSA’s minimum wage and overtime requirements may result in substantial liability for Indiana healthcare employers and certain officers. It is critical to the long term financial health of any organization to take proactive steps to comply with the FLSA. If we can help, please call.

***This briefing does not constitute legal advice. Please see an attorney about any particular matter.**

Greg is a partner and a member of the firm’s Employment and Labor and Healthcare Groups. Since 1994, he has represented Indiana hospitals, physician practices, long term care facilities, and other healthcare employers and human services organizations in wage and hour and a wide variety of other employment matters. A substantial part of his practice involves counseling and training management teams on compliance with the various employment laws that impact operations.