An Ounce of Prevention Is Worth a Pound of Cure: Wage & Hour Compliance Strategies That Will Reduce the Risk of the Bet the Company Class Action

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When it comes to wage and hour legal risk, the choice is yours: Do you want to be the Hero...

...or the Goat?
WAGE AND HOUR LITIGATION TRENDS AND STATISTICS

FLSA Collective Action Litigation Trend

In the last two years, **90%** of all employment class and collective actions have been Wage & Hour cases.
The Problem

- Healthcare Employers’ Wage and Hour Practices Are Under Attack

Healthcare Industry is a Major Target

- In 2008 and 2009, more than 530 wage and hour lawsuits were filed against healthcare organizations
- Wage and hour class/collective actions against healthcare organizations increased 35% from 2008 to 2009
- Home care employers specifically are being targeted:
  - Gentiva Health Services, Inc.
  - Amedisys, Inc.
  - Maxim Healthcare Services
Health Care Class Actions Are All Over the Map

Wage Hour Class/Collective Action Complaints Against Healthcare Organizations Since 1/1/09

Why are These Claims Being Brought?

To quote Willie Sutton, “because that’s where the money is.”
Fight on Two Fronts

The New DOL—Enforcement and Legislative Initiatives

Targeting Healthcare Employers

- Focus on industries "known for employing vulnerable workers"
- Healthcare specifically referenced
- February 22, 2010, DOL Press Release:
  - 66% of healthcare employers investigated by Albany office in last 5 years violated
  - Collected more than $2 million in back wages
  - Announced major compliance initiative targeting New York healthcare employers
WHAT ARE THE POTENTIAL COSTS ONCE A CLAIM IS FILED?: EXPOSURE MODEL AND RECENT SETTLEMENTS

The BIG Question: How Much Will It Cost If We Lose?

• Two types of exposure:
  – Historical exposure
  – Continuing exposure

• How long?
  – FLSA has a two year statute of limitations, but the limitations may be extended to three years if the violation is considered “willful”
Sample Historic Exposure Model

Assumptions:
• 2,000 Full-Time Non-Exempt Hourly Employees
• “Average Hourly Rate” = $20.00
• “Average Overtime Rate” = 1.5 (X) $20.00 = $30.00
• 50 weeks potentially eligible for overtime per year per employee
• Conservative number of hours worked “off the clock”(0.5 – 2.0 hours per week)
• 3-year Statute of Limitations = 150 weeks potentially eligible per employee
• Double for liquidated damages

Calculation:
• 2,000 Employees (X) 150 Potentially Eligible Weeks Per Employee = 300,000 Total Potentially Eligible Weeks
• 300,000 Total Potentially Eligible Weeks (X) Assumed Off-the-Clock Hours = Total Off-the-Clock Hours
• Total Off-the-Clock Hours (X) Average Overtime Rate ($30.00) = Total Initial Exposure
• Total Initial Exposure (X) 2 (Liquidated Damages) = Total Potential Exposure
Potential Exposure

• 0.5 hours per week = $9,000,000 Total Potential Exposure
• 1.0 hours per week = $18,000,000 Total Potential Exposure
• 2.0 hours per week = $36,000,000 Total Potential Exposure

Continuing Violations and Additional Exposure

Liability is not limited to damages incurred in the past, the liability continues on a going-forward basis for all those currently employed and to be employed in the future

Same basic assumptions:
• 2,000 Non-Exempt Employees (X) Assumed
  Off-the-Clock Hours (X) Average Overtime Rate
  (X) 2 (Liquidated Damages) = Potential Prospective Exposure Per Week
Potential Continuing Exposure

- 0.5 hours per week = $60,000 Potential Exposure Per Week
- 1.0 hours per week = $120,000 Potential Exposure Per Week
- 2.0 hours per week = $240,000 Potential Exposure Per Week

Data on Settlements

- Publicly-reported data on W&H class and collective action final settlements
- **2009:**
  - Median: $1,500,000
  - Average: $6,784,532
- **2010:**
  - Median: $1,800,000
  - Average: $5,521,853
Settlements of Wage-Hour Cases against Healthcare Providers

- $60 million to settle claims that the hospital failed to include a short-shift differential in the regular rate when calculating overtime pay for 2,117 nurses ($28,342 avg. per employee)
- $85 million to settle claims that 23,000 nurses and other 12-hour-shift employees were denied extra pay after a change in California law entitled them to overtime ($3,696 avg. per employee)
- $19 million to settle claims that 2,500 nurses, social workers, and aides who claimed they were denied meal and rest breaks ($6,000 avg. per employee and $4 million in fees and costs).
- $1.7 million in back wages to nurses for work done during unpaid meal breaks to settle DOL lawsuit

STRIKE ZONES: OFF-THE-CLOCK WORK AND EXEMPTION PROBLEMS
Strike Zones: Off-The-Clock Work

- Use of electronic devices – smartphone usage after hours, non-exempt work at home
- Missed/interrupted meal and rest periods
- Travel time
- Waiting/On-call time
- Timekeeping rules: rounding, auto-deductions, regular rate
- Training time
- Volunteer activities

Strike Zones: Exemptions

- Professional Exemption
  - Advanced knowledge in specialized field (e.g., LPNs v. RNs)
  - Paid salary or fee
- Administrative Exemption
  - Discretion and Independence
  - Paid salary or fee
- Executive Exemption
  - Two or more FTEs
  - Paid salary
- Companionship Services Exemption
  - “General household” work must not exceed 20% of total weekly hours worked
  - DOL proposed rule risks application to home care industry employees
Strike Zones: Exemptions (cont.)

- Duties and Compensation Tests
  - Non-exempt activities must be limited
  - Fee-based employees’ fees must be for “unique” activities
  - Salaried employees must be guaranteed at least $455 per week
- Pay per visit v. salary-plus compensation plans
- State laws vary (e.g., RNs may not be classified as exempt professionals under CA law)
- Employees should keep accurate records of all time worked

DEVELOPING AN EFFECTIVE PREVENTION & COMPLIANCE PROGRAM
An Effective Compliance Program

- Wage and Hour Policies
- Eliminate Assumptions
- Complaint and Investigation Procedures
- Training
- Audits
- Exemptions: Developing Evidentiary Support

An Effective Set of Policies

- Policies must address all areas of potential wage and hour compliance concerns
- Policies must be well-publicized and easy to locate
- All employees should review policies on a regular basis and acknowledge receipt of same
- All employees should be trained on key policies
### Important Policies for Home Care Employees

- Explaining Overtime Eligibility
- No off-the-clock work
  - Pre- and Post-Shift Work
- Explaining Meal and Rest Periods
- Travel, including addressing “continuous workday” issues (e.g., calling patients before leaving home)
- Record all working time
- For employees paid per visit:
  - Ensure policies explain that all visit-related activities are compensated via the visit rates
  - Consider advantages of transitioning to salary-plus compensation system

### Certification of Time Records

- Require non-exempt employees to review time records.
- Daily review is ideal but something less frequent can be used provided employees have the opportunity to review actual records.
- Provided records are correct, require employee certification as to accuracy.
- If records are not correct, require employee to identify any inaccuracies to permit immediate correction.
- Require employees to review accuracy of paycheck and, if systems permit, certify secondary review. On-line tools make this level of review more available.
- Certification should cover off-the-clock work and meal periods.
Implement A Complaint Mechanism

• An effective and confidential complaint mechanism allows the employer to uncover and correct issues before litigation.
• Give employees a choice:
  - Ethics or compliance hotline (1-800 #)
  - Designated HR professional
  - A senior manager
• Revise existing complaint mechanism to ensure it specifically addresses wage and hour issues.
• Must be well publicized: Publicize complaint mechanism in handbooks, open door policies, collective bargaining agreements, ethics handbooks, and other employee communication channels.

Follow Through: Investigate & Resolve

• Your organization must follow through on complaints
  - Written investigation procedures
  - Assign accountability so issues do not fall through the cracks
• Ensure confidentiality where possible
• Investigate promptly and thoroughly
• Provide closure to complaining employee
• Fix problems promptly
### Impose Appropriate Discipline for Policy Violations by Employees and Managers

- In some reported cases, employers have been criticized for quickly disciplining employees for timekeeping violations but not doing so for manager violations.
- Manager misconduct is increasingly being characterized as wage theft.
- Manager misconduct should be promptly addressed and, where confirmed, considered serious violation of the company's most important policies.

### Train, Train, Train

- Most employees and managers don't know the basic rules or understand why they are important.
  - Rules are complex
  - Laws not common sense
  - Often ideas that seem great can violate policy or the law
- The best policies are useless if employees don’t understand them and you don’t enforce them.
How Training Helps Defeat Off-the-Clock Work Claims

- Prevent inadvertent federal and state law violations.
- Prevent claims:
  - Policies are clear and irrefutable.
  - Plaintiff credibility?
  - More difficult to certify a class.
- Reduce damage awards and potentially build a good faith defense.
- Build a culture of compliance.

Who Should Be Trained

- Training should be targeted to suit the needs of different employee audiences
  - Managers
  - Employees (non-exempt)
  - Payroll/compensation specialists
- Employee training should focus on the basics, such as:
  - What is working time/what is not
  - Rules relating to overtime
  - Prohibition against off-clock-work
  - How do I report errors and misconduct?
Periodic Reminders

- Timekeeping policies and procedures should be reinforced through available communication means
- Annual letter to all employees
- Newsletters
- Postings
- Refresher trainings

Compliance Areas to Audit

- Exempt classifications
- Off-the-Clock
- Regular rate calculations and other pay practice issues (including state law)
Before Starting an Audit

- Goals and Scope
- Audit Protocol
- Privilege Issues
- Remedial Measures
  - Your company must be prepared to fix uncovered errors

Exemption Audit: Best Practices

- Review Documents
- Interview SME Managers
- Interview Incumbent Employees
- Reach Consensus on Job Duties
- Prepare Legal Memos on Exempt Jobs
- Implement Remedial Measures
Controlling Your Risk

- Keep job descriptions up to date, and have employees confirm accuracy during performance appraisal
  - Ex) Self-evaluations and job descriptions focusing on unique duties/discretion
- Include explanation of compensation in offer letter (e.g., if pay per visit, explain visit rate/any additional pay)
- Centralized review of new and changed jobs by HR/Legal
- Periodic training for HR/Legal

Exemption Litigation: A Common Sense Solution

- Exemption litigation trends can be easily identified by position and industry.
- Employers should plan today for the exemption litigation of tomorrow and create multi-faceted evidentiary records to support claimed exemptions.
Common Problems in Exemption Litigation

- The named plaintiff disclaims any responsible decision making. In other words, the "I'm a drone" syndrome.
- Employer lacks sufficient evidence to contest the plaintiff's self-serving understatements as to actual work performed.
- You discover there are not contemporaneous business records of actual job responsibilities that can be used to impeach the plaintiff's testimony.
- Supervisory testimony regarding the plaintiff's job responsibilities is discounted or disregarded by the court.
- Summary judgment is denied because of material issue of fact arising out of contradiction between what plaintiff "said" and employer "said" regarding descriptions of job duties.

Exemption Litigation: A Common Sense Solution

The starting point for our analysis begins with four simple questions:

1) Which high incumbent exempt positions are the likely target of litigation?
2) If we were sued tomorrow on one of the identified positions what evidence could we marshall to support the claimed exemptions?
3) Does the existing evidence support the claimed exemption?
4) What would be on our evidentiary wish list if we could develop the evidence we really need?
**Identify Options for Developing Evidentiary Record of Exempt Duties**

- **Annual self-assessment** as part of performance review
- **Skills/Experience Index**
- **Internal resume**
- **Written record of decision-making** (i.e. written counseling)
- **Annual certification confirming performance of key exempt duties**
- **Work plans for customer interactions**

**Integrated Systems**

- Automated and integrated time, attendance and payroll systems can reduce wage-hour compliance issues
  - More accurate time records
  - More likely that employees will record all hours worked
  - More difficult for managers to shave hours
Potential Off-the-Clock Work Red Flags

- Time punches exactly the same every day
- Delay between scheduled shift start and time punch
- Electronic touches occurring before or after time punches

Now that you have the information, it’s up to you...
Questions?

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