WAGE AND HOUR COMPLIANCE

KEY ISSUES AFFECTING THE HEALTHCARE INDUSTRY
Speakers

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Why Compliance Matters

• Obama Administration has promised increased enforcement activity and has substantially increased DOL resources.
• The plaintiffs’ bar has launched an aggressive nationwide campaign, using websites like http://hospitalovertime.com, to encourage hourly employees at hospitals and healthcare facilities to join wage and hour lawsuits.
• Settlements in private and DOL enforcement actions routinely run in the $2 million to $5 million range, and have exceeded $85 million.
Topics to Be Covered

• Who is Exempt?
• What Hours Count?
• How is the Regular Rate to be Calculated?
• What New Legislation is on the Horizon?

• Focus here will be primarily on the FLSA – state laws vary and need to be checked
Who is Exempt?

- Employees employed in a “bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1).
- To qualify for a white-collar exemption, an employee must meet the salary basis test and “customarily and regularly” perform any one or more of the exempt duties of an executive, administrative, or professional employee. 29 C.F.R. Part 541.
- Employees who do not qualify for any exemptions are entitled to overtime compensation for all hours worked over 40 in any given workweek. 29 U.S.C. § 207(a)(1).
What Does Salary Basis Mean?

• Salary Basis Test (29 C.F.R. §§ 541.600-604)
  • Employee must receive total annual compensation of at least $100,000 and/or be paid at least $455/week on a salary or fee basis
  • Employee’s salary cannot be “subject to reduction because of variations in the quality or quantity of work performed.”
  • Employee must receive his entire salary for any week in which he performs work, regardless of the number of days or hours worked. Employee need not be paid for any workweek in which he performs no work.
Salary Basis, cont’d.

- Salary Basis Test (29 C.F.R. §§ 541.600-604)
  - No deductions for absences caused by the employer or the operating needs of the business.
  - Deductions of one or more **full** days can be made for absences for personal reasons, other than sickness or disability; pursuant to bona fide sickness or disability plan; and for penalties imposed for infractions of major safety rules and workplace conduct rules.
  - An “actual practice” of making improper deductions will lose exemption for all employees in same job classification working for same responsible managers.
Docking Issues

- Ex. 1: Hospital has a bona fide sick leave plan. Exempt RN asks to take intermittent leave of 3 hours/day once a week for physical therapy. Can that pay be deducted from her salary?
  - No. Only deductions in full day increments may be made pursuant to a bona fide illness plan.

- Ex. 2: RN is scheduled to work an 8 hour shift but is released early because the facility overscheduled the shift. Can a deduction be made?
  - No. Employer cannot make any deductions for reasons related to its own operating needs.
Executive Exemption

• Duties Test – Executive Exemption (29 C.F.R. § 541.100)
  • Employee’s primary duty must be to manage the business, or a department or subdivision of the business.
  • Employee must “customarily and regularly” direct the work of two or more other employees.
  • Employee must have the authority to hire or fire other employees or, alternatively, the employee’s suggestions and recommendations regarding hiring, firing, advancing and/or promoting other employees must be given “particular weight.”
Administrative Exemption

- Duties Test – Administrative Exemption (29 C.F.R. § 541.200)
  - Employee’s primary duty must be to perform office or non-manual work “directly related to the management or general business operations of the employer and the employer’s customers.”
  - Employee’s primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.
Learned Professional Exemption

- Duties Test – Learned Professional Exemption (29 C.F.R. § 541.300)
  - Employee’s primary duty must be to perform work requiring advanced knowledge.
  - The advanced knowledge must be in a field of science or learning.
  - The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
    - Having the appropriate academic degree satisfies this requirement – a general college degree or high school diploma not sufficient.
Computer Professional Exemption

- Duties Test – Computer Professional (29 C.F.R. § 541.400)
  - Employee’s primary duty must consist of:
    - the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
    - the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
    - the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
    - a combination of the aforementioned duties.
Exemption Examples

• Ex. 1: An RN who is registered by the appropriate State examining board and exercises judgment and discretion in the performance of her duties is paid at a rate of $60/hour and generally works 45 hours/week. Is she exempt?
  • No. While RNs usually qualify for the learned professional exemption, RNs who are paid on an hourly basis do not and should be paid overtime.

• Ex. 2: An employee works both as an RN and as head scheduler for the unit. Is she exempt from overtime pay?
  • Possibly not. An analysis would have to be made as to what her “primary duties” are. If they are consistent with the requirements of the learned professional exemption, she could still qualify for an exemption even if some duties might not fall within the exemption requirements.
Exemption Examples cont’d.

• Ex. 3: Hospital classifies “as needed” nurse practitioners as nonexempt but other nurse practitioners as exempt. Does this difference in treatment jeopardize the exempt status for the one group?
  • No. DOL has stated that classification is based on compensation and job duties, not job titles.
• Ex. 4: Hospital requires greater levels of academic and professional achievement from its respiratory therapists than is required by state’s licensure or other hospitals. Can the hospital treat them as exempt under learned professional exemption?
  • Probably not. 2005 DOL opinion rejected exemption, noting that the issue is whether an advanced degree has become a standard prerequisite for a particular occupation.
What Hours Count?

• Employees must be paid for work “suffered or permitted” by the employer even if the employer does not specifically authorize the work. 29 C.F.R. § 785.11.

• So long as the employer “knows or has reason to believe” that such work is occurring, the employee must be paid for the hours, even if off-site or off-shift. 29 C.F.R. § 785.12.
8 and 80 Rule

- Allows for scheduling flexibility.
- FLSA permits hospitals and other healthcare institutions to calculate overtime for all of their employees based on a 14-day period. 29 U.S.C. § 207(j).
- Employer-based exemption so can be applied to employees that are not in the medical field per se – e.g., public relations, payroll, accounting, engineering, and information technology.
- Employees entitled to receive OT for hours worked over 8 in any workday and over eighty hours in the 14-day period.
The 14-day period must be fixed and regularly recurring. 29 C.F.R. § 778.601(c).

Employer and employee must reach agreement to use the 8 and 80 system before the employee performs the work to which it is intended to apply.

Employer cannot use both 40-hour and 8 and 80 systems for a single individual employee.

If using the 8 and 80 system, premium pay for daily overtime may be credited towards overtime compensation due for hours worked in excess of 80 for that period. 29 C.F.R. § 778.601(d).
• Ex.: Employee works an 8-hour shift on 9 of the 14 days in the 14-day period and a 10-hour shift on the 10th day. How much overtime due under the 8 and 80 rule?
  • Two hours of overtime compensation, assuming the employee did not work on the remaining 4 days.
  • Premium pay for the daily overtime could be credited to the overtime compensation due to employee.
Alternative Shift Schedules

• *Parth v. Pomona Valley Hosp. Med. Ctr.* – October 22, 2009 decision by the Ninth Circuit (California)
  • Hourly nurses volunteered to work 12-hour shifts
  • Hospital reduced hourly base wage rate to keep overall compensation the same.
  • Holding: No FLSA violation where employees paid reduced rate (still above minimum wage) for first 8 hours, 1.5 times that rate for remaining 4 hours and double time for hours worked beyond shift.
Alternative Shift Schedules

“7 and 70” Shift

- LPNs scheduled to work 7 10-hour shifts then given 7 consecutive days off. Any OT due?
  
  - OT at 1.5 times rate for hours past 8 in a day, but no more where there is a prior agreement to calculate overtime based on 14-day schedule.
Pre- and Post-Shift Hours

• Hours worked prior to or after an employee’s principal activity are not compensable time unless they are an “integral and indispensable” part of those activities. 29 U.S.C. § 254.

• But, if the hours worked are integral and indispensable, they will count as hours worked even if not authorized by the employer if the employer “knows or has reason to believe” that such work is occurring.
Pre- and Post-Shift Examples

• Ex. 1: LPNs assigned to a busy critical care unit routinely stay post-shift to complete their time sheets and notate patient charts. Compensable?
  • Yes. This work is integral to performance of their job duties.

• Ex. 2: A medical tech chooses to change into and out of his scrubs and hairnet in the locker room at the hospital. Is this time compensable?
  • No. As employees have the option and ability to change into these items at home, changing gear is not a considered a principal activity and is not likely to be compensable.
When Does Travel Time Count?

• Ordinary travel to and from work is not compensable. 29 C.F.R. § 785.35

• Travel time that occurs in the day’s work, such as mid-shift travel from one hospital to another, counts as hours worked. 29 C.F.R. § 785.38.

• However, if an employee works at two facilities in a day and heads home from the second facility, the time spent traveling from that facility to home does not constitute hours worked.
Travel Time Examples

• Ex. 1: LPN works at a assisted living facility. She has been asked to fill in for someone at a “sister facility” after she completes her shift. It takes her 30 minutes to travel to the 2nd facility. Does that 30 minutes count?
  • Yes. The travel time must be considered part of the hours worked.
• Ex. 2: Respiratory therapist is asked to fill in for a full day at a sister facility. Is her morning 30 commute to the sister facility compensable?
  • No. Travel to and from work is not compensable.
Training Time

• Time spent attending lectures, meetings or training programs is compensable unless:
  • attendance is outside of the employee’s regular working hours;
  • attendance is truly voluntary;
  • the course, lecture, or meeting is not directly related to the employee’s job; and
  • the employee does not perform any productive work during such attendance.

29 C.F.R. § 785.27.
Training Time Example

• Ex.: Supervisor schedules a lecture during work day. She tells LPNs attendance is voluntary but employees are disciplined if they don’t know topics covered during session. Compensable?
  • Yes. Because the lecture subject is directly related to and a requirement of the job, attendance is not actually voluntary.
Meal and Rest Periods

- Meal and rest periods not required under FLSA.
- Short breaks (generally 5 to 20 minutes), are hours worked and compensable.
- “Bona fide” meal or break periods (typically 30 or more minutes) do not count towards hours worked, provided employees actually take the break and are “completely relieved from duty” during that time. 29 C.F.R. § 785.18.
- California requires employers to provide a 30-minute meal break for any person who works a period of more than five hours.
Meal and Rest Periods cont’d

• Ex.: LPNs in the pediatric intensive care unit are given 30-minute meal breaks. Routinely, they are interrupted by requests to assist patients or to answer phones for the unit. Given their workloads, they also frequently eat lunch at a desk while completing charts. Does the 30 minutes count?
  • Yes. According to a 2008 DOL opinion letter, such breaks would have to be counted since the meal periods are spent working on tasks predominantly for the benefit of the employer.
Automatic Deductions

• Subject of numerous collective actions currently pending (e.g. Fengler v. Crouse Health)
• Issue is whether employers should or should not take automatic deductions for meal breaks.
• Ex.: A skilled nursing facility automatically deducts one half-hour for meal breaks each shift. Upon hiring, the employer notifies the employees of the policy and of their responsibility to take the break. Is this lawful?
  • Yes, but the employer must monitor to ensure that the breaks are actually taken without interruption.
On-Call and Call-Back Time

• Periods of inactivity while on duty are hours worked and compensable. 29 C.F.R. § 785.15.

• Periods during which an employee is “completely relieved from duty“ and which are long enough to enable him to use the time effectively for his own purposes are not hours worked.”

• The relevant distinction is whether the employee is “engaged to wait” or “wait[ing] to be engaged” -- the former is compensable, while the latter is not.
On-Call and Call Back Time cont’d.

• Ex. 1: Hospital requires its hourly nurses to carry a pager during 1-hour lunch breaks, but they are allowed to leave the hospital with no other restrictions. Compensable time?
  • No, because they are allowed to leave the premises and have few restrictions on their time. Employees required to remain on-call on or close to the employer’s premises such that they cannot use the time effectively for their own purposes, however, are considered to be working and the hours compensable.

• Ex. 2: Hospital requires its hourly on-call equipment repair technician to carry a pager, remain sober, be available on twenty minutes notice, and answer calls usually 3 or 4 times per shift. Compensable time?
  • Probably yes. Frequency of the calls will be a factor.
Aggregation of Hours When an Employee Works at More than One Facility

- FLSA requires employers to include all hours worked for the same “enterprise.”
- “Enterprise” is defined as “the related activities performed (either through unified operations or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments by one or more corporate or organization units.” 29 U.S.C. § 203 r(1).
Factors Used in Determining Whether Joint Employer or Single Enterprise

- DOL regulations provide: “if employment by one employer is not completely disassociated from employment with the other employer(s), all of the employee’s work for all of the joint employers during the workweek is considered one employment for purposes of the act.” 29 C.F.R. § 791.2(a).
- 2005 DOL Opinion Letter: Concluded that the facilities of system with two acute-care hospitals, a nursing home and one combined long-term hospital and nursing home were under common control of the parent company and all hours worked had to be aggregated.
Factors Cited By DOL in 2005 Opinion

- System was owned by a single, not-for-profit parent holding company that had no employees
- Facilities shared a president and board of directors
- The Hospital’s HR department provided support to the nursing home
- The system’s VP of HR and several senior executives had responsibility for more than one entity
- Some of the facilities’ personnel policies were the same
- Job vacancies were posted within the system before being advertised publicly
Joint Employer cont’d.

• Will be a fact intensive assessment based on totality of the circumstances.
• Using separate tax identification numbers, filing separate tax returns, and maintaining separate licenses, while relevant, may not be determinative.
• Focus will be on the economic realities of the relationship.
• Core issue is extent to which there is common control.
Another Aggregation Example

- Ex. 1: Certified nursing assistant works at a single facility through three referral agencies for a total of more than 40 hours per week but never for more than 40 hours at the behest of a single referral agency. Is the hospital liable for overtime?
  - According to the 2\textsuperscript{nd} Circuit yes. Hospital was joint employer with referral agencies.
Rounding Errors Can Get You in Trouble

- Issue arises when employer tracks time in 15 minute increments.
- Rule: 1-7 minutes may be rounded down to 0; 8-14 minutes round up to 15
- Ex. 1: Hospital docks employees a full quarter hour when they start more than 7 minutes after their scheduled shift.
  - OK – if do not dock if employees are less than 7 minutes late.
Rounding Errors cont’d.

• Ex. 2: Employee routinely starts 10 minutes before shift every day and clocks out 7 minutes after shift. Standard shift is 40 hours. Is the OT owed?
  • Yes: 1.25 hours of OT owed.
How is the Regular Rate Calculated?

- OT must be equal to at least 1.5 times employees’ regular rate of pay. 29 U.S.C. §§ 207(a)(1), 207(j).

- The regular rate is the “hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed.” 29 C.F.R. § 778.108.

- It “include[s] all remuneration for employment paid to, or on behalf of, the employee” with the exception of certain specified payments. 29 U.S.C. § 207(e).
Special Payments and Offsets

• Payments included in the “regular rate”:
  • Shift differentials and commissions
  • Non-discretionary bonuses
• Payments excluded from the “regular rate”:
  • Premiums paid for overtime, weekend, and/or holiday work
  • Payments made for occasional periods when no work is performed due to vacation, holiday, or illness
  • Discretionary bonuses
What About Variances in Pay Rates When Aggregating Hours Across System?

- Requires communication and cooperation between the employing entities.
- Regular rate is computed by using the weighted average of the rates:
  - Add together the earnings from all of the employee’s jobs.
  - Divide the total by the total number of hours worked.
  - If more than one facility is involved, overtime may be allocated between the entities on a pro-rated basis.
- Employers may agree in advance with employees that they will be paid no less than 1.5 times the hourly rate established for the type of work they actually perform during the overtime hours. 29 U.S.C. § 207(g).
What is Next on the Horizon?

• Wage Theft Prevention Act (H.R. 3303)
  • Tolls the running of the statute of limitations for wage and hour causes of action from the date the Secretary of Labor provides notice to an employer of any investigation related to such cause of action until the date the investigation has concluded
• Family-Friendly Workplace Act (H.R. 933)
  • Gives private sector employers the option of compensating employees for overtime work with paid time off rather than cash wages
What is Next on the Horizon?

• Living American Wage Act of 2009 (H.R. 3041)
  • Indexes the hourly minimum wage to 15 percent above the federal poverty threshold

• Working Families Flexibility Act (H.R. 1274)
  • Allows employees of employers with 15 or more employees to request a change in terms and conditions of employment related to the number of hours, the times, and the location at which the employee is required to work, with associated record-keeping duties