

PUBLICATION

The Payroll Risk From Within

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At a time when Medicare reimbursements and other sources of revenue are threatened to be frozen or even reduced, a recent trend has been noticed that provides for an additional threat to long term care facilities and other health care providers – the risk of employee suits for unpaid wages. Fortunately, this is one risk that can be well managed and largely eliminated through effective preventive measures.

The Fair Labor Standards Act (FLSA)

The FLSA sets a minimum wage for employees in the United States and also ensures the payment of overtime (one and a half times the regular rate) for all non-exempt employees. Virtually all businesses in the country are covered by the FLSA, and both the United States Department of Labor and individual employees have a right to sue for unpaid wages.

The FLSA's payment provisions are intentionally written broadly and are designed to encompass all time that employees work for the benefit of an employer. Employers should be very cautious about standard or otherwise automatic deductions from time worked using payroll systems that account for meal breaks, other breaks or automatic work stoppages. For instance, some payroll systems provide for an automatic deduction of 30 minutes or one hour for a meal break or other 15 or 20 minute breaks or coffee breaks for time that employees are supposed to receive as time off. However, if the employee in fact works all or a portion of that time period (whether because of an emergency situation, understaffing needs or because the employee is not able to finish his or her work during a prescribed time period), that time is compensable under the FLSA.

The Exposure Can Be Great

Under the FLSA, workers are entitled to sue for all amounts of unpaid wages owed for a three-year period (a two-year period can be applied in certain limited situations). Further, if some amount is determined to be owed by the court, the employee is entitled to an additional liquidated penalty equal to the unpaid wages, as well as all attorneys' fees and expenses associated with the suit. It is typical in these cases for individual worker claims to be far eclipsed by the amount of attorneys' fees and costs awarded by a court, and it is not uncommon to find different cases in which employees are alleged to have been docked five to ten minutes of work per day.

Recent Trends for Health Care Providers

Several plaintiffs' firms have targeted long term care providers for FLSA suits. The reality is that many workers in this industry find themselves unable to take lunch breaks or other meal breaks as a consequence of their position, such as when a patient has an incident requiring immediate attention. Suits have recently been filed against health care providers in the South, and employers need to understand how to prevent FLSA suits against their facility. The plaintiffs' firms are relying upon their own publicity via the Internet and mass mailings to attract more suits. Because registered nurses are licensed by the state and the records are open to the public, they are easy for plaintiffs' firms to identify. Also be aware that once a suit is filed, then FLSA provides a mechanism for a plaintiff's lawyer to contact existing and former employees of a defendant employer.

Risk Areas and Preventive Measures

As noted above, many employees in the long term care industry miss meal or other breaks as a consequence of high work loads, limited staffing and resource availability or other emergencies that arise during their shift. Consequently, the highest risks to employers exist when they utilize payroll systems that automatically deduct or assume certain uncompensated time exists during the work day – whether it is for personal break, meal break or otherwise. The following are some preventive measures long term care employers might consider:

- Provide training to your supervisors to monitor employees and know how to spot those who might not take their required breaks.
- Encourage your supervisors to remain open to employees who might need to adjust their documented hours.
- Review payroll records to ensure adjustments to employees' time are entered accurately.

Baker Donelson's attorneys have extensive experience in reviewing and auditing employment manuals and procedures to ensure compliance with the FLSA and companion state statutes requiring payment of wages. It also has teams dedicated to the defense of lawsuits filed under the FLSA and similar laws – whether class actions or individual actions. Should you need help in any of these areas, do not hesitate to contact any member of the Long Term Care Industry Service Team.

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