PROACTIVE STEPS FOR HOSPITAL EMPLOYERS TO AVOID WAGE AND HOUR PITFALLS

California Hospital Association
Labor and Employment Law Seminar

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Alternative Workweek Schedules, Meal and Rest Periods, and Emerging Legal Issues
Alternative Workweek Schedule Issues

Basic AWS Requirements: Establishing a Lawful AWS

- Work unit
  - Does it meet the legal requirements?
  - Does it work for the department?
- Schedule
- Election

Alternative Workweek Schedule Issues (cont.)

Basic AWS Requirements: Implementation of the AWS

- Schedule must remain regular
- AWS schedules do not follow employee to a new unit
- Floating between units
- Flexing AWS employees
  - Regular schedule requirement
  - On-call issues
  - Short-shift premium (SSP) issues
Alternative Workweek Schedule Issues (cont.)

How to Avoid AWS Litigation

• HR should be involved in all elections
• Frequent manager training
• Reinforce process for reporting SSP
• Consider new election if significant issues are identified

Meal Periods

• “Provide” standard
• Timing, duration and number of meal periods
• Waivers
• Combining meal and rest periods
• Who can be restricted to the premises?
• On-duty meal period agreements

Continuing Meal and Rest Period Pitfalls
Continuing Meal and Rest Period Pitfalls (cont.)

Rest Periods

• “Authorize and permit” standard
• Timing, duration and number of rest periods

Meal and Rest Period Legal Challenges

• Non-compliant policies (facially and in practice)
• Interrupted meal/rest periods
• Second meal period waivers
• Walk time
• When must “short” meals be paid?
Emerging Legal Issues

- Rounding and grace periods
- Meal and rest period premium rate of pay
- Regular rate of pay calculation
- The Victoria’s Secret theory

Emerging Legal Issues (cont.)

Mobile Devices and the Health Care Workforce

- Off-the-clock work
- Interrupted meal and rest periods
- Expense reimbursement
- Privacy issues
Emerging Legal Issues (cont.)

Challenges for Employers in the Home Health Industry

• Timekeeping and minimum wage
• Rest breaks
• “Non-productive” time
• Wage statements
The Case: *Browning-Ferris Industries* (Aug. 2015)

The Facts

The New Joint Employer Test

- Both are employers within the meaning of the common law
- They share or codetermine those matters governing the essential terms and conditions of employment
- Look to see if a “right” to control, whether or not actually exercised
- Control need not be exercised directly and immediately
- Reserved authority and indirect control are sufficient

Joint Employer Status (cont.)

What is the Practical Impact?

- National Labor Relations Act
  - Have to bargain over terms and conditions over which it possesses authority to control
  - Supplier and user employers may be combined without the consent of both employers *Miller & Anderson* (July 2016)
  - Possible scenarios: nurse registries, traveler agencies, housekeepers, foodservice and grounds
Joint Employer Status (cont.)

• State and federal wage-hour laws
  – $3,775,000 settlement where hospital and traveler agency alleged to be joint employers
  – Could happen with nurse registries
  – Meal, rest, overtime, improper AWS, etc.

• State and federal anti-discrimination laws

• Examples of Types of Control
  – Control number of workers
  – Set timing of shifts
  – Dictate when tasks must be completed
  – Assignment and supervision of duties
  – Right to remove a worker

Joint Employer Status (cont.)

• Best Practices — Contracts with Supplier Employers
  – Disclaim joint employer status
  – Specify that supplier responsible for all aspects of employment, including wages and benefits
  – Specify that supplier responsible for hiring, supervision and discipline, and user has no right to comment
  – Include strong indemnification provision
  – Do not deal with small companies
  – Do not dictate number of employees or enforce productivity standards
Joint Employer Status (cont.)

• So, What Does it Really Mean?
  – Protect yourself from joint employer status where you can (e.g., food service)
  – Protect yourself in other situations (e.g., nurse registry) by using substantial companies and insisting they comply with wage-hour rules

Questions?
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