Podcast

Healthcare Wage & Hour Issues, Explained

By Daniel F. Thornton & Andrew Bellwoar

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From meal breaks to bonuses, employers in the healthcare industry manage one of the most complex workforces. They also face a spectrum of competing federal and state laws and regulations regarding employees' wages and hours.

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Transcript

INTRO

From meal breaks to bonuses, employers in the healthcare industry manage some of the most complex workforce problems, including competing federal and state wage and hour laws and regulations.

On this episode of We get work®, we explore how healthcare employers can anticipate and confront some of the most common wage and hour issues in their industry, including classifying exempt and non-exempt employees, appropriately compensating overtime and overseeing independent contractors.

Our hosts today are Daniel Thornton, of counsel in Jackson Lewis' Philadelphia office, and Andrew Bellwoar, associate in the firm's Washington D.C. region office, both members of our Wage and Hour Group.

Dan and Andrew, the question on everyone's mind today is: What are the key steps healthcare employers can take right now to remain compliant with wage and hour laws, and how does that impact my business?

CONTENT

Daniel F. Thornton
Of Counsel, Philadelphia

I'm thrilled to be here with Andrew to talk about common wage and hour mistakes and pitfalls that we see with a focus on our healthcare clients. We find that proactive review of pay policies and practices is one of the easiest ways to avoid litigation in this area. With that, I'll pass it off to Andrew.

Andrew Bellwoar
Associate, Washington, D.C. Region

Thanks, Dan. It's nice to be here with you today. One of the areas that we most frequently see issues pop up is in relation to breaks, specifically meal breaks. The

FLSA, Fair Labor Standards Act, is going to be the act that underlies a lot of the issues we talk about today. Although the FLSA doesn't require breaks, when employers do provide them to employees, as a lot of employers do, there are a couple of things that employers need to keep in the back of their minds whenever they're thinking about how to handle these breaks.

So, especially when it comes to meal breaks, the most important part is that they should be uninterrupted for at least 30 minutes. So, employees shouldn't be doing work during them. They shouldn't be called in away from their lunch. It really should be set aside for the employee. Dan, we've talked a couple of times about certain issues that have popped up that are specifically related to this. It happens a lot during, especially with nurses. They can get called back to perform some emergency procedure or if there's light staffing, they'll be pulled back onto the floor. But that's where employers can start getting into some hot water.

Thornton

Absolutely. Ensuring that breaks are genuinely duty-free and uninterrupted can be tricky, particularly if someone is on call during the break. We see this, especially in the healthcare field.

That brings us to the next sub-part of this, which is what do you do when a break does get interrupted, despite your best efforts?

Bellwoar

One of the important things that employers are supposed to do is make sure that they have some set procedure for how to compensate an employee for any interrupted meal break. It's not the end of the world if somebody gets pulled back onto the floor, but the reality is that the employee then has to get paid for that time. Not just the time that they're on the floor, but the time for the entire meal break if it was interrupted before those 30 minutes is up.

One thing that a lot of employers will tend to do is they'll have some kind of slip of paper or some reporting mechanism to make sure that an employee is able to report an interrupted meal break to either their supervisor or HR. At that point, it's important that the supervisor and/or HR make sure that the employee gets compensated for that time. So, it should be done at the end of that week; make sure that everything is buttoned up with each pay period. Really, the important part is to keep in mind that if it is less than 30 minutes for that break, then it needs to be compensated to the employee. So, that's really going to run through a lot of the issues that we see today, too. As time worked, it's time that the employee needs to be compensated.

Dan, you've come across a couple of these issues as well for the beginning and ends of shifts, right?

Thornton

Absolutely. One other thing on those interruptions is that it doesn't really matter what mechanism you have, whether that's a paper form or some of those other things you mentioned, like some payroll systems, that let you flag it within the

system when submitting a timecard. The main thing is to ensure that the mechanism is actually used because we see plenty of cases where the employer says we have a process, but when you actually investigate, it's used very little or almost never. So, having the system in place doesn't matter very much if it's not actually being used because that's absolutely going to be looked into when there is a claim or an allegation.

That leads right into the next topic we have on our list, which is the beginnings and ends of shifts and making sure that wage and hour practices there are compliant as well. One of the most common issues we see here is paying to a schedule rather than actual hours worked. This is fairly common in some healthcare contexts. We also see it a lot in manufacturing and production facilities.

There's a temptation to believe that the schedule is what actually happens and to just pay based on what's scheduled, but reality often differs and often by quite a bit. So, the best practice and what we always recommend is to pay hourly employees to the punch from when they clock in until when they clock out and avoid any rounding, paying to a schedule or anything else that's going to deviate from the actual clocked time without a reason. It could be that there's a missed punch--- someone forgets to clock out, and the time keeps running at the end. Or they forget to clock in, and they're not being paid at the beginning. That should be corrected. There should be a memo or comment from the manager or relevant supervisor there to explain it. In cases other than that, the best practice and the way to avoid headaches in this area is to just pay people to the punch every time.

For hospital-based operations or more intensive care units, there's constant staffing. Paying people to a schedule doesn't make a lot of sense because there are necessary shift handovers. Patients can't just go from one shift to the next without some handover activities or meetings to transfer duties and bring everyone up to speed. So, if you are going to go by a schedule, it often makes sense to have some overlap that's sufficient in time so that those shift transfer activities can all take place on the clock because, without question, that's all compensable time. Briefing your relief shift or vice versa is always going to be compensable and needs to be on the clock.

On a related point, time clock placement can be important here as well. The best practice is to keep time clocks either at the facility's main entrance or at the perimeter rather than forcing people to clock in at each duty station or work area. It may be that there is a lengthy walk to get to the actual time clock. If a lot of that walk is on the employer's premises, say within a hospital complex, there's potential liability there, particularly under many states' laws that are more aggressive than the FLSA in compensating that time. So, the best practice is to pay to the punch and to put time clocks in a location where your employees are clocking in as soon as they are on your premises.

Bellwoar

Dan related to that and going back to the potential issues of employees not punching out or having some issue with their punches. That's another opportunity for employers to have some system in place to correct those punches. So, somebody

can talk to HR, talk to their manager, review their paycheck at the end of each pay period and sign off on it to make sure everything's right. Those are just more opportunities for employers to potentially avoid some of the liability that can come from these issues.

Thornton

100%, and on that note, the policies you have in place are important. We recognize that the reason for rounding or paying to a schedule is often because of concerns that employees are messing around while on the clock. They come in, they get coffee, they read the newspaper, talk with their colleagues about whatever and spend substantial time in the aggregate not doing compensable work even though they're clocked in. But the answer to that, and what we always recommend in these cases, is to have a vigorous policy that requires you to be doing compensable work when you're on the clock and being paid.

When you see a violation, the way to enforce it is to pay for every minute worked but also impose discipline consistent with the policy to bring everyone into compliance. You are always going to create a bigger issue by fighting about the compensable time or not paying for the time that arguably was worked than by having a clear policy and imposing progressive discipline in a manner that's uniform and consistent. In our experience, it doesn't take a lot of disciplinary effort to get folks in line and to reach an understanding as to what needs to be happening on the clock versus off the clock. It's always going to be cheaper than dealing with a class or collective action later because the clocking policy was too aggressive.

Bellwoar

There's no doubt about that. Actually, one way that a lot of employers do address these pretty early is by having a bunch of written policies that they give to employees right when they start. So, these can be policies about automatic deductions for meal breaks, for instance. That's one that we see pretty commonly.

There are also a bunch of disciplinary procedures and policies that people can lay out. There are really a lot of things in a general handbook that employees are supposed to review when they are onboarded. A lot of times, employers will have their employees sign those policies or handbooks just as an acknowledgment of what we talked about at the beginning. Then, it's always important to make sure that employees have access to the handbook, too, so they can always check what those policies are.

There is training, informal conversations with managers and HR and a lot of different ways that employers can deal with these issues if they pop up and they can really prevent them from popping up. But as you said, Dan, it's very important to make sure that compensable time is always paid.

Thornton

Absolutely. We have rounding issues next on our list. Andrew, do you have anything more to say about those?

Bellwoar

You can typically avoid issues when it comes to rounding by paying people to the punch. So, that is paying them for the exact amount of time when they clock in to when they clock out. That's always the easiest way to avoid any potential liability there.

The FLSA does allow for a little bit of rounding. There are a couple of different mechanisms to do it, but the important part is that you actually do that in accordance with what the FLSA requires. So, in short, you can round, but you have to make sure that you're not doing it improperly. There are five-minute, six-minute, and even fifteen-minute allowances for rounding. But the important part is if you're halfway through that period, you're supposed to round up. If you're halfway under that, then you're supposed to round down. You can't really finagle the numbers there. So, if you have a fifteen-minute rounding policy and somebody's 11 minutes into that next 15 minutes, you can't then round that down. It might save you a couple of bucks in the short term, but as Dan alluded to earlier, the cost of any class or collective action that comes from one of these violations is more than enough reason to make sure that you're complying with the actual law. So, just making sure that you are staying true to rounding up and rounding down is a great way to avoid any liability there.

There are also some other issues when it comes to paying people based on bonuses, especially when it comes to hourly work. Dan, have you had any experience with that?

Thornton

Absolutely, and this is a trickier issue, probably a little more advanced than some of those basics we've been talking about. It's a source of confusion for employers of all sizes and sophistication, from some of the very largest hospital systems and health networks you can imagine down to local and smaller operations, because the laws and the rules surrounding them are difficult.

What the regular rate requires is, essentially, that all remuneration paid to an employee be included in the calculation of the overtime rate of pay with certain defined exceptions. The most common one of these is bonuses. There are certain other payments that need to be included, too. We see some of those in the healthcare context. Shift differentials would be one. Those are very common for 24-hour operations, as many hospitals are. Where you have overnight shifts, we often see a shift differential or certain higher acuity units. There are often different differentials and calculations that go into how each hourly shift is paid. Generally speaking, all differentials like that need to be included in the regular rate calculation. All of that needs to go into the numerator, essentially divided by total hours worked, to figure out the regular rate of pay so that you can figure out the appropriate overtime premium for that pay.

Bonuses are one of the most common issues in this area and one of the most common pitfalls or compliance failures that we see. Because, again, the rule is not straightforward. The question that the FLSA and its regulations ask is whether the bonus is discretionary. What that means is, does the employer make the decision

both as to the payment of the bonus, the fact that it's being paid, and second, the amount of the bonus? Is the employer deciding all of that relatively close to when the bonus is actually paid? So, something that's closer to a gift or like a special recognition, like maybe a holiday or Christmas bonus where you decide early in December what's going to be paid towards the end of December. That's one thing that's pretty clearly discretionary. But when you have a quarterly bonus, a performance-based bonus, or one thing we've seen, a lot are hazard-based bonuses, such as picking up additional shifts. This was a pretty common practice during the COVID era: Picking up more shifts when patient volumes were high, and facilities were understaffed. If there's a bonus associated with that, and the criteria are very clearly advertised to your employees, almost certainly that is a non-discretionary bonus. It needs to be included in the regular rate calculation. When these bonuses can run into hundreds of dollars, it makes a big difference in terms of the regular rate of pay as well as the appropriate overtime rate of pay.

So, it's important to both include everything and, if there is any uncertainty, get a legal opinion. Run it by your lawyer. You'll always thank yourself for doing that rather than wandering in the dark and only figuring out later when there's a claim about what's been going on. Andrew, do you have any more thoughts on this topic?

Bellwoar

The only thing I was going to mention is that this is especially true for the healthcare industry, where there can be a lot of overtime. So, even if you have a couple hundred-dollar bonus, if that affects the overtime rate over the course of 20 overtime hours in a pay period, that can start adding up really quickly.

Thornton

There are many shift schedules and double shift arrangements that result in a lot of overtime, either every week or in alternating weeks. As Andrew said, that makes it all the more important because it increases the possible damages for every single person and for a class or collective as a whole when one of these issues arises.

With that, we can move on to our next topic, which is the appropriate classification of your employees. As you probably know, there are exempt and non-exempt employees. Exempts are higher-level professionals, generally supervisors, learned professionals or administrative employees like HR and IT. They have to have an applicable exemption, and those employees are exempt from most of the requirements of the FLSA, including the overtime requirements and the minimum wage requirements. But most of the employees we've been talking about, and most baseline-level healthcare workers are going to be non-exempt. They're paid on an hourly basis, and they're always going to be entitled to overtime when they exceed 40 hours in a work week.

One of the common exemptions in this area is called the learned professional exemption. This is one where we see a lot of healthcare clients are maybe overly or unduly aggressive with it. It's important to be careful about the exemption factors, review them against your job descriptions and ensure that those factors are actually being met in practice. Fights about misclassification can become very expensive because you're looking at, essentially, overtime pay entitlement for the

entire statutory period, which is two or three years, depending on the FLSA, and can be longer under many state laws. What a learned professional needs are three factors. One is to be paid on a salary basis of at least $684 per week. That's about $35,500 a year. Then, the employee's primary duty has to be the performance of work requiring advanced knowledge, which means work that is primarily intellectual in character and includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge has to be in a field of science or learning and be customarily acquired by a prolonged course of specialized intellectual instruction.

Where this becomes difficult to apply is for lower-level healthcare workers. The doctors of the world, the nurse practitioners and mid-level providers of the world pretty clearly meet this. All of them have master's degrees or higher-level degrees. There's no question that's a prolonged course of intellectual instruction. But a medical assistant or someone who has just a certificate, maybe not even an associate or bachelor's degree, is probably not going to qualify for an exemption like this.

Where to draw the line, again, as we'll say repeatedly throughout our conversation here, get good legal counsel and talk to your lawyer. The typical place where we draw the line is somewhere around nurses, and it depends on the level of training of the nurse. The U.S. Department of Labor's Wage and Hour Division has guidance on this and provides that nurses who are registered by the appropriate state examining board are generally going to meet the duties and requirements for the learned professional exemption. Meaning that they meet the hardest part of the test. Their primary duty is work requiring advanced knowledge that's primarily intellectual in nature. As long as they meet the rest of it---that they've acquired it by a prolonged course of intellectual instruction, and they're paid sufficiently on a salary basis, they can qualify as learned professionals. But again, every element of that exemption test has to be met, and it's important to review each position as well as what employees are actually doing day-to-day to make those decisions.

Bellwoar

Dan, one of the frustrating parts, especially for employers, is that the burden is usually on them to demonstrate all this. So, it's not as easy as just simply saying this person's exempt or pointing to an exemption and just saying, well, I thought that that was good enough. In reality, it's not. It's the employer's job to be able to show these are the exact duties that qualify for it. That's where talking to an attorney is really helpful because you can go through the job description and the actual functions that the employee is doing in order to match up any of those duties with what's required for the exemption.

Thornton

The U.S. Supreme Court has recently clarified that employers don't have any heightened standard in order to prove that an exemption applies. Some circuits had previously imposed a heightened standard of clear, convincing evidence. The Supreme Court has settled that question and made clear we only have to prove an exemption by a preponderance of the evidence, which means 50 % plus a little bit. But that's still a substantial amount of evidence, and you need to be confident

based on what the employee is actually doing, what the job description and other documents say, that the nature of their work is exempt and that they're being paid in an appropriate manner that fits with the exemption.

With that, I think we have a little bit to say about the gig economy and the classification of independent contractors.

Bellwoar

So, a lot of people will ask questions about whether my people should be employees or should they be independent contractors. Should they be W2s or 1099s? That's something that a lot of employers and even employees or contractors are really mulling over at the moment. As Dan mentioned, there's a good amount of the gig economy going on where people are trying to work in multiple situations, multiple places of business and all that kind of stuff. In some ways, it can benefit the individual as well as the person who hires them.

Dan mentioned that, especially when it comes to certain exemptions for the FLSA, like the white collar exemptions, employees are not covered by the FLSA's protections for minimum wage, overtime and other things. Well, if somebody's a true independent contractor, then they're not even mentioned in the FLSA because it really only applies to employers and employees. If somebody's an independent contractor, well, they're not your employee. The difficult part is it's not as simple, again, as just labeling somebody as an independent contractor. The employer needs to actually be able to show that they're an independent contractor.

The way that the DOL looks at this is in what's called the “Economic Realities Test.” It balances a bunch of different factors that look at the actual relationship between the individual and the place that's hiring them. So, it can look at the duration of the time that the people are working there and the degree of control that the owners and operators have over the work that's done by the individual. It looks at a bunch of different other factors, too, like how much of this is really the independent contractor working for themselves or is it really an employee that's working for the direct benefit of the employer? It's not one test or one factor that determines if somebody's an independent contractor or an employee. It balances a bunch of those different factors. There are six factors in all, but it’s a case-by-case analysis. So, again, speaking to an attorney trying to analyze whether somebody would qualify as an independent contractor or an employee, it's very important for this kind of thing because, like with the overtime issue, if you have somebody that was misclassified as an independent contractor, then you are going to have to go back and pay them back wages, overtime compensation and maybe penalties on top of that. So, making sure that you have all your ducks in a row when it comes to that classification before it becomes an issue is really important for employers.

One area that we're seeing this more and more is, for instance, traveling nurses. That's something that you're going to see a lot in the healthcare industry, and oftentimes, they're qualified as independent contractors. The reason is that they have a very short tenure at any particular place they're working at, they're not as closely monitored by the employer and really, one of the bigger parts of it is that they're not directly contributing to the growth of the industry. They're just hired in to help out for a short-term need or something like that. That's something that is

usually pretty close to an independent contractor classification. So, it should be good. But as soon as an employer starts exerting more control, having a greater length of time for that nurse to be there, possibilities of promotions or other different ways that the independent contractor (who's maybe an employee) can grow in whatever place that they're in. Those are all indicators that the DOL might look and say, well, no, this person was actually an employee. So, it's important to take a look at each of those possible gray areas for independent contractors and make sure that everything is in compliance with the FLSA.

Thornton

Absolutely. We also see this a lot in the home healthcare space, as these home healthcare agencies are pretty aggressive in classifying almost the entirety of their workforce as independent contractors. If it really is a true independent relationship where a provider works for multiple of these agencies and switches back and forth, that may pass muster, but it's an area of vulnerability and a real area of focus for the DOL. We see a lot of investigations that focus here, and often, one of the first questions that the DOL has when they do come in to investigate is, do you have independent contractors, and how many? So, it's important to have all your ducks in a row, seek legal counsel and be sure that the arrangement reflects the economic reality.

It's also important to mention that there are a number of states, including New Jersey, that have more stringent and harder-to-meet standards that surpass even the Economic Realities Test. So, just because you have an arrangement that passes muster under federal law doesn't mean that the legal questions are in then. So, yet another reason to make sure you have good counsel at your fingertips in order to make sure all your practices are fully compliant in this area.

Bellwoar

There can be a number of different areas where the FLSA has basic requirements, and then states will come in and provide even more protections for employees. So, it's very important to look at not only what the FLSA requires but also make sure that you comply with any kind of state laws and regulations.

Thornton

Very true. Well, with that, we thank you all for joining us and we look forward to providing additional updates throughout the year.

Bellwoar

Yeah, it was a pleasure speaking with everybody. I hope you enjoy the show, and yeah, stay tuned for more.

OUTRO

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