In recent years healthcare provider organizations, including hospitals and long term care facilities, have come under increased scrutiny by the Federal government and class action law firms seeking plaintiffs for wage and hour class actions against their employers. Since 2009, the DOL has significantly increased its agency funding and hired at least 350 new Wage and Hour investigators to assist the agency in conducting FLSA compliance audits. Before 2009, healthcare employers already were experiencing a 30 percent increase in wage and hour compliance audits. The healthcare industry has since received much of the DOL’s compliance focus. In 2010, the New York Department of Labor announced a state-wide healthcare FLSA compliance initiative based on a five-year survey showing that 64 percent of healthcare employers were not compliant with wage and hour laws.

Not wanting to be left out of this mix, class action plaintiff’s attorneys have also focused their attention on the healthcare industry. Today, wage and hour claims lead all other employer-related lawsuits in federal court, with class action lawsuits having been filed against healthcare employers in nearly all 50 states. With these lawsuits, organizations can find themselves paying out sizeable back pay amounts, hefty penalties and attorney fees, with legal fees and costs adding up to millions of dollars.

The complex workforce dynamics within a 24/7 healthcare organization can make wage and hour compliance complicated. Combine a lack of knowledge about state and federal law requirements with the mentality that ‘everyone is doing it,’ and it’s easy to see how healthcare has landed in the spotlight of both the DOL and class action litigators.

The DOL promises to get tough on noncompliant employers. With its “Plan/Prevent/Protect” Compliance Program, the DOL has put employers on notice that they must “find and fix” wage and hour
The FLSA requires that covered employees be paid minimum wage for all hours worked and overtime at a rate of at least time and one-half the regular rate for all hours worked in excess of 40 hours in a workweek. Exempt from the FLSA minimum wage and overtime requirements are individuals that meet certain executive, administrative or professional exemptions under the Act. The exemptions are narrowly construed against the employer and the employer bears the burden of establishing exempt status.

To qualify for one of the three exemptions, an employee generally must meet both a salary and duties test. An exempt professional must be compensated on either a salary or fee basis at a rate of not less than $455 per week. The employee must also be primarily engaged in duties meeting one of the three exemption tests.

Certain nonexempt healthcare employees may be compensated for overtime on an 8 and 80 basis meaning that they are paid overtime for all hours worked in excess of 8 hours in a day and 80 hours in a two-week pay period.

violations before being targeted by DOL compliance audits. Under the DOL’s initiative, employers are encouraged to proactively develop self-audit programs, compliance action plans and follow-up analyses as part of on-going compliance. Healthcare employers overall should expect a more aggressive DOL to expand compliance audits to include multiple employer sites and/or corporate affiliates. Noncompliant employers also face higher settlement demands and enforcement penalties than ever before.

In promoting wage and hour compliance initiatives in their own facilities, healthcare employers need to be educated about federal and state wage payment requirements, have a firm understanding of the specific pay policies of their organizations, and utilize technology as a tool to make compliance easier. This white paper outlines the top ten mistakes that hospitals make regarding labor laws and how to avoid them.

1 Certain nonexempt healthcare employees may be compensated for overtime on an 8 and 80 basis meaning that they are paid overtime for all hours worked in excess of 8 hours in a day and 80 hours in a two-week pay period.
Effective August 23, 2004, the DOL revised its interpretive regulations defining the FLSA’s exemptions. Employers that have not conducted a formal analysis or audit of exemption status and/or have undergone major restructuring of job classifications since that time may be noncompliant with current DOL regulations. It is important that employers review their policies and procedures for determining exemption status and conduct a full audit of exempt classifications to ensure they are compliant with state and federal law.

It is also important that employers protect the exemption status of employees so designated under the Act. Unlawful deductions from the weekly salary of an exempt employee can undermine exemption status for the employee (as well as others in the job classification). Common deductions which undermine exemption status include those for partial day absences, disciplinary suspensions, and forced low census that results in employees receiving less than their full salary in any workweek in which the employee performs work. In this area employers can also leverage technology to ensure that exempt employees are not inadvertently subjected to unauthorized salary deductions that may negatively impact their exemption status.

Healthcare employers traditionally have utilized various bonus and incentive pay programs to reward performance, encourage employees to meet performance goals, and to incentivize employees either to expand their knowledge base, cross-train to other specialties, or to pick up additional shifts and hours. Compliance problems arise when such incentives and bonuses are either excluded from overtime calculations, or not properly allocated to time periods over which such incentives and bonuses are earned.

Federal law requires that all compensation relating to work performed be included in the employee’s regular rate and used to calculate overtime for hours worked in excess of 40 hours in a workweek. With certain limited exceptions, bonuses (including incentive pays) which are paid on a regular and consistent basis or communicated to employees in advance of payment are considered non-discretionary and must be included in the regular rate of pay when calculating employee overtime. For example, when a hospital pays an employee a shift bonus for picking up additional shifts or hours in a workweek, that bonus must be added to the employee’s pay when determining the regular rate used to calculate overtime.
In situations where a bonus is earned over a period of time longer than a single workweek (such as when a retention or hiring bonus is paid out to employees over several weeks or months) the employer must either include the bonus in the regular rate as it is earned, or at the time it is paid, go back and retroactively apportion the bonus back over the workweeks in which it was earned. Employees would then be entitled to additional compensation in any workweek in which the employee earned overtime, to the extent the bonus amount would have bumped up the regular rate used to calculate overtime for that particular workweek.

For example, if an employee receives a hiring or retention bonus for continued employment over a three-month period, the employer must allocate that bonus across all the pay periods in that three month period of time. If the employee earned overtime in any of those past pay periods, the portion of the bonus allocated to that pay period must be added to the regular rate and overtime recalculated to include the additional pay.

This is another area in which technology can help. A comprehensive time and attendance solution can streamline the adjustments and calculate the overtime pursuant to FLSA standards. A sophisticated retro-pay calculator within the software solution can ensure that even the most complex pay code modification, such as a bonus that retroactively affects overtime rates, is accurately calculated. That saves your staff many hours of time and helps ensure accurate overtime payments.

A primary target of lawsuits in healthcare has been the industry practice of automatically deducting meal periods from worked hours. Many healthcare providers use an automatic lunch deduction, where 30 minutes is automatically deducted from time worked after the employee works a certain number of hours (usually after five or six hours). For example, if an employee clocks in at 7:00 am and clocks out at 3:30 pm, a 30-minute meal break would automatically be deducted, showing that the employee worked eight hours. Typically, employees or their supervisors can override the automatic lunch deduction in situations where employees are unable to take an uninterrupted 30-minute meal break.

The FLSA does not mandate meal periods but requires employees be paid for any break lasting less than thirty minutes. The law also requires that employees be “completely relieved from duty” during unpaid meal periods. A violation of federal law may occur when an employee is subject to an automatic meal period deduction, but does not otherwise receive a full 30-minute uninterrupted break. In general, an uninterrupted break means that the break must not be “meaningfully interrupted” by work which may include returning pages and calls, or answering questions from other staff, patients or family members.
To maintain compliance regarding paid and unpaid meal breaks, it’s important for a healthcare employer to develop a policy regarding meal periods for non-exempt employees. That policy should state the organization’s commitment to provide uninterrupted meal periods and the employee’s responsibility for indicating when a meal period has been missed. Managers must be educated in the importance of meal period compliance and be proactive in either ensuring that interruptions during the meal period do not occur, or that employees otherwise are paid for any such missed or interrupted meal periods.

Healthcare employers may want to consider implementing practices that discourage missed meal periods and other off-the-clock work. Common examples include prohibiting nonexempt employees from taking smartphones and pagers to meal breaks, establishing specific guidelines regarding when an employee may be contacted during a meal period, ensuring adequate replacement staffing for employees during designated meal periods, and requiring employees to sign off on timecards or otherwise attest that they received meal periods deducted from their paychecks. Employers are well advised to determine whether their organizations can utilize employee timecard sign-off screens with attestation text specific to the particular facility and its time and attendance solution. Also, healthcare employers will want to ensure that any automated time tracking system has an automatic safeguard which ensures that breaks lasting less than 30 minutes are paid in their entirety.

No. 4 mistake
Joint Employment

Two or more related employers that share “common control” of a single worker will be deemed individually and jointly liable for the payment of minimum wage and overtime on aggregated hours worked for the employers in a single workweek. Such common control may be found any time there is at least a 50% common ownership between employers and/or when two (or more) employers are not “completely disassociated” with each other as it relates to a particular employee. Employers with staffing and/or affiliation agreements for provisional staffing are also more vulnerable to joint employer issues. Failure to understand the rules of joint employment may result in healthcare employers failing to appropriately pay employees for overtime earned under federal and/or state law.

CONTINGENT STAFFING
Temporary staff may contract through multiple agencies as a way to maximize their incomes. Likewise, a healthcare organization may have multiple locations and rely on different agencies to fulfill temporary staffing needs. Your organization may be liable to pay overtime if temporary staff end up working more than 40 hours a week through multiple staffing agencies providing services at a single facility or across multiple corporate facilities. Organizations are often challenged in tracking employee information across multiple facilities and ensuring other departments, such as payroll, have the information they need in order to ensure proper compensation.
A centralized location for all employee information can help reduce the number of mistakes related to ensuring proper compensation for joint employees. By assigning a unique identifier to each employee, an employer can track the employee throughout the entire organization, and know exactly when, where and how many hours were worked and how much overtime is due the employee.

Enhanced partnerships with temporary staffing agencies can also help reduce the number of errors. If a healthcare organization and temporary staffing agency share the same technology, they may more easily access and communicate employee pay information, which can reduce payroll errors and minimize claims for unpaid overtime.

**COMMON CONTROL**

Many hospitals are part of larger health systems and those health systems may partner with other healthcare providers throughout a geographic region to ensure proper coverage and care within a community. In situations such as this, it is not uncommon for facilities to share employees or float employees between facilities.

Such “common control” of employees may establish joint employer liability, where one employer has 50% or more total business ownership invested in another or where there is common corporate ownership and/or control over the two employers. Joint employer liability may also exist in situations involving more limited ownership, depending upon particular facts which indicate authority and direction exercised by one employer over another.

Even if the facilities have different tax IDs, an employee who works between two or more facilities that have such common control must have their hours aggregated to determine overtime eligibility. For example, if an employee works 25 hours at one facility and 25 hours at another facility that are under common control, that employee is eligible for 10 hours of overtime.

In this scenario, having a unique employee identifier can help ensure wage and hour compliance as well as help eliminate confusion in determining hours worked. All of the employee’s work-related activities can be compiled and reviewed so the organizations can appropriately calculate overtime.

Likewise, intelligent workforce management technology can alert scheduling managers to potential overtime situations so they can schedule employees to avoid overtime situations before they occur.
Improper pushing and pulling of hours that cross over workdays and/or workweeks is another common wage and hour violation that is unique to healthcare. A workweek is defined as a fixed and regular recurring period of seven consecutive 24-hour periods. There is no requirement that the workweek begin at midnight. In fact, the workweek can begin on any day and at any hour of the day. However, once the beginning of an employee’s workweek has been established, it must remain fixed regardless of the employee’s work schedule.

With advances in communication that empower employees to stay connected 24/7, it is very easy for off-the-clock work to occur. If employees are returning pages, checking emails or completing training modules at home without badging in (or otherwise recording their time), they are working off the clock. If left unaddressed, that leaves your organization vulnerable to claims of unpaid wages.

The ability to badge in remotely either from a computer or mobile device can allow anyone with connectivity to clock in and out without having to be physically in front of a time clock or badge reader. This ensures that all work performed, whether on the floor, in the lunchroom or at home, is tracked. Additionally, empowering employees to review and sign-off on their timecards each pay period can help eliminate errors and ensure that everyone is being properly compensated for all work performed, regardless of where it occurs.
DOL regulations and opinion recognize that each workweek stands alone and the averaging of hours over two or more weeks is not permitted. This means that regardless of the day and time that the workweek begins, that day and time must serve as a strict cutoff for the workday and workweek. Any time worked before the cutoff should be allocated to the day before and anything worked after the cutoff should be allocated to the day after.

A sophisticated time and attendance system can help alleviate confusion and ensure that payroll and scheduling are able to talk to each other effectively. By allocating the actual hours worked into the right workday and workweek, the time and attendance solution helps ensure that all regular pay and overtime are calculated and paid accurately.

Continuing education and updating of credentials are standard practice at all healthcare facilities, but is it standard to pay employees for time spent attending these types of activities? The answer to this question isn’t as simple as you might think.

Take for example, a voluntary lunch-and-learn session. Lunch is paid for, but is the employee’s time compensated? Providing employees a free meal during this type of lunchtime event does not relieve an employer from its obligation to compensate employees for missed lunches. Rather than the free lunch, the more relevant consideration is whether the meal period is truly used for the employee’s own benefit or for the benefit of the employer. The more work-related the session is, the more likely the time will be deemed as hours worked.
To clarify whether the event is used for the employee or employer benefit, consider this: a long-term care facility holds a lunchtime program on new care techniques for alleviating depression in patients with Alzheimer’s disease. Two types of employees attend. One employee is on the nursing staff and regularly works with patients suffering from Alzheimer’s as part of her day-to-day responsibilities. Because the session is directly related to the type of work the nurse performs in her daily routine, she will need to be compensated for her time, regardless of whether or not lunch is provided. The other employee works in payroll and at home cares for a sick parent suffering from the same disease. The payroll employee is not required to be compensated because the information does not apply to her daily responsibilities on the job. Although attendance is voluntary for both employees, the employer only benefits directly from the attendance of the staff nurse.

In a scenario where an employee must maintain a certification as a condition of continued employment, the rules are a little less clear. In general, an employer is not required to treat time spent by an employee to maintain licenses and/or certifications necessary to meet minimum job qualifications as hours worked. However, if the employer recommends or requires additional certifications that will make the employee better qualified or better able to perform his or her job, then the time would be considered worked time and must be compensated.

A comprehensive workforce management system can help healthcare organizations ensure that employees are appropriately compensated for their attendance at these educational sessions. Sophisticated badge readers make it easier to track the employee’s time as ‘non-productive’ or ‘education’ while still ensuring that they are paid for the time spent in training.

Whether you are a multi-facility organization and your nursing staff routinely floats between facilities or you are a temporary staffing agency employing staff at multiple locations, travel time is considered work time and must be compensated as such, including overtime as applicable.

An employer is required to pay non-exempt employees an overtime rate for all hours worked in excess of 40 hours in a single workweek. Whether travel time is considered hours worked will depend upon the particular circumstances. When travel occurs all in one day, hours worked includes all time spent in travel. For travel that involves an overnight stay, hours worked includes only travel time that occurs during what would be the employee’s regular working hours. In other words, if it takes more than one day to arrive at a job and that nurse is scheduled to work from 8:00 a.m. – 5:00 p.m., he/she will only be compensated for those hours, regardless of if he/she continues to travel until 6 p.m. Likewise, compensation for the following day will not start until 8:00 a.m. even if they begin travel at 7:30 a.m.

Keeping track of travel time and ensuring proper compensation doesn’t have to be difficult if you leverage workforce management technology solutions to help. Many of the same features that allow for better management of off-the-clock work can be used to keep track of travel time, such as the ability to badge in remotely using a computer or mobile device. In addition, smarter scheduling tools that provide deep insight into travel staff schedules allow managers to know exactly when employees are scheduled, for how long and where. Robust reporting features can also notify managers of schedules and provide warnings when overtime has the potential to create a problem so adjustments can be made.
10

It is critical to accurately classify both independent contractors and volunteers. First, know who the independent contractors are and what they’re doing. To help ensure compliance, audit independent contractors to determine if they’re classified correctly. Keep in mind that the more control the healthcare organization has over the worker and how work is done, the less likely it is that the employee is truly an independent contractor.

Another common mistake that many organizations make is inadvertently assigning the wrong duties to a volunteer. When budgets are tight, volunteers can seem like a cost-effective option for performing certain tasks. Problems begin to occur when a volunteer is asked to perform a task or job that is or was previously done by a paid employee. If, for example, the cashier at the gift shop was laid off due to budget cuts and the hospital then places a volunteer in that position, he or she is entitled to fair compensation as a paid employee. By failing to pay that employee for the work performed, the organization is now responsible for back wages and overtime compensation which can be very costly, especially if the work has occurred over a lengthy period of time.

Every state has different requirements when it comes to the business of caring for patients. Whether it is staffing legislation that requires specific nurse to patient ratios, or overtime laws that prohibit individuals from working more than 12 hours in a single shift, there are many rules that need to be followed and they are different in almost every state. If your organization happens to have a footprint in multiple states, keeping track of all the rules and regulations is even more complex. However, class action litigators are including both federal and state labor law violations to increase their chances for higher settlements. So it’s important to understand and comply with both federal and state regulations.

Additional questions arise when state and federal regulations conflict with one another. In those situations, taking the course of action that is most favorable to the employee is recommended.

When healthcare organizations have facilities in multiple states – and even multiple time zones – a comprehensive workforce management solution can help deal with the intricacies of the pay policies and regulation compliance. Automating these more complex policies ensures accuracy and consistency by eliminating the need for manual workarounds.
CONCLUSION

Wage and hour lawsuits in healthcare are an unpleasant fact of life that many organizations would like to ignore, but it’s an issue that needs to be addressed head on. Begin with the basics by reviewing your employee handbook and payroll policies. Develop a comprehensive training program so that everyone, from executives to managers to the front line staff, understands the law and your organization’s policies to comply with the law. Hold managers and employees accountable for adhering to the policies, and make sure everyone understands how to report compliance issues without fear of retribution. Then, follow up and fix any compliance issues quickly.

Gaining an awareness of the most common wage and hour mistakes outlined in this paper provides a strong foundation for achieving compliance with federal and state regulations. Developing a plan to address and avoid those issues builds upon that foundation. However, it’s also important to enlist the help of experts—either internal resources or outside counsel—to ensure that many complexities involved with FLSA compliance are addressed correctly.

While it can be tempting to keep wage and hour skeletons in the closet, that approach carries a high risk. We encourage you to invest the time and effort now to ensure that your organization is compliant so you can avoid costly litigation and damage to your organization’s reputation.
Stephanie Dodge Gournis
Partner at DrinkerBiddle

Stephanie Dodge Gournis is a partner in the law firm of Drinker Biddle & Reath, where she is a member of the Labor & Employment Practice Group and hiring partner for the Chicago office. Stephanie is engaged exclusively in the representation of management in all aspects of traditional labor and employment matters.

Stephanie regularly represents employers in defending administrative and federal/state court complaints involving state and federal wage and hour claims, equal employment opportunity discrimination, retaliatory discharge, harassment, whistleblower rights, and claims brought under the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA).

Stephanie devotes a significant portion of her practice to representing hospital and health care clients in labor relations and employment matters and regularly conducts wage and hour compliance audits and EEO/union vulnerability audits for health care systems and stand alone health care facilities, both big and small.

J.P. Fingado
President and Chief Executive Officer

J.P. Fingado is President and Chief Executive Officer of API Healthcare and has over 20 years of senior-level healthcare information technology experience. Previously, J.P. served as Vice President and General Manager of Cerner Corporation. During his time at Cerner, he held several executive-level positions where he was accountable for sales, operations, and research and development. Prior to joining Cerner, J.P. was President and Chief Operating Officer of Dynamic Healthcare Technologies, a publicly held clinical software provider. He received a Bachelor of Arts in Economics from Bates College in Lewiston, Maine.