

HEALTHCARE UPDATE: WINTER 2006

This bulletin provides an update on employment issues for Healthcare Update subscribers. Please contact us if you have any questions about these decisions or about their effects on your business.

Physician Behave Thyself

The Seventh Circuit Court of Appeals decided the case of Dunn v. Washington County Hospital in November 2005. In Dunn, the court addressed the extent to which an employer can be held liable under Title VII for harassing conduct dished out by someone who was not an employee of the organization. The plaintiff, Lisa Dunn, was a registered nurse at a small public hospital. Thomas Coy, a surgeon, was hired as an independent contractor to lead the hospital's Obstetrics and Emergency Care Departments. Six different nurses later alleged that Coy sexually harassed them. After the hospital told Coy about the harassment allegations, Coy pressured the nurses, including Dunn, to revise or retract their statements. Dunn and several other nurses resigned and then Dunn filed her lawsuit.

The hospital argued that, since Coy was not its employee, it could not be responsible for Coy's treatment of the nurses. The Court of Appeals, however, stated that, under Title VII, "an employer is responsible for every 'tangible employment action' (hiring, firing, promotion or its absence, wage setting, and the like) plus any other discriminatory term or condition of employment that the employer fails to take reasonable care to prevent or redress . . . it makes no difference whether the person whose acts are complained of is an employee, an independent contractor, or for that matter, a customer."

This is not a new concept, but it's an important principle to keep in mind. Employers must have a broad sense of ownership regarding the conditions at their workplace and should implement workplace harassment policies that address the behavior of non-employees such as contractors, vendors, customers, or other visitors to the premises. Affirmative steps must be taken to combat such harassment. Complaints of third-party harassment should be handled in the same manner as harassment complaints levied against employees: investigate, analyze the findings from the investigation, take prompt action geared at stopping any harassing conduct, and reasonably monitor the situation to ensure that no further harassing conduct takes place.

Social Workers, Caseworkers, & Medical Coders: Exempt from Overtime?

In October and November 2005, the United States Department of Labor issued two opinion letters which impact the health care industry. The Fair Labor Standards Act (FLSA) ordinarily requires workers be paid overtime for hours in excess of forty per week, but provides exemptions for employees who function in executive, administrative, or professional capacities. The Department discussed three types of employees – Social Workers, Caseworkers, and Medical Coders – and found that only one of the three would be exempt from overtime requirements.

One Department of Labor opinion letter distinguished Social Workers from Caseworkers. It was clear under the terms of the letter that neither Social Workers or Caseworkers could qualify for an executive or administrative exemption, because the employees were not supervising other workers and did not perform work related to management or general business operations. The letter then considered whether Social Workers or Caseworkers could be subject to the professional exemption of the FLSA. It found that Social Workers with master's degrees using those degrees in their work will generally meet the criteria for the professional exemption: 1) work requiring advanced knowledge; 2) work involving science or learning; and 3) acquisition of knowledge through a prolonged course of specialized intellectual instruction. Caseworkers with bachelor's degrees or skills acquired through experience could not meet this test and therefore could not meet the test for a professional exemption.

For the same reasons, the Department of Labor did not consider Medical Coders under the executive or administrative exemption, instead analyzing whether they could qualify for a professional exemption. Applying the same three-part test, the primary duties of Medical Coders were found not to require advanced knowledge acquired through prolonged specialized academic training. The Department stated that colleges and universities did not generally recognize the field of medical coding as a bona fide academic discipline. Some coders had four-year degrees in Health Information Management, but some employees could do the job without a degree. Therefore, Medical Coders – like Caseworkers – are subject to overtime pay requirements under the FLSA.

Department of Labor Investigates Off-the-Clock Work

In July 2005, the United States Department of Labor ended its investigation into health maintenance organization Group Health Cooperative's timekeeping and overtime records. The government alleged violations of the Fair Labor Standards Act ("FLSA") for Group Health Cooperative's failure to pay overtime and failure to keep accurate records of employee work time. The investigation began over a year before and involved surveying employees to ascertain the number of undocumented "off the clock" overtime hours worked without pay. There was no indication whether the inquiry was the result of an employee complaint or the product of a routine examination of FLSA compliance.

As a result of the federal investigation, Group Health Cooperative agreed to pay a total of over \$1.6 million to settle the potential claims of nearly 1000 employees at thirty facilities. Group Health admitted no wrongdoing in the consent judgment to be filed with the court. Since the onset of the investigation by the Department of Labor, the organization implemented an automated timekeeping system with greater accuracy than the prior procedures. Also, the employer has invested in training on the timekeeping system for the entire staff.

Attracting the spotlight of government investigators, routine or otherwise, can be expensive for your organization. It's important for employers to be ever-vigilant about internal timekeeping and other procedures prior to such an investigation. Monitor all on-the-clock employee work time for non-exempt employees and ensure that your workers are paid for all job time and given all required breaks or meal periods. Be careful and watchful about wage and hour requirements on the front end and avoid having to pay more for costly litigation and forced compliance on the back end.

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