

what

Senior Living Employers SHOULD KNOW ABOUT DEPARTMENT OF LABOR AUDITS

By Diane Marie O'Malley, Esq.

The United States Department of Labor's (DOL) Wage and Hour Division enforces the federal Fair Labor Standards Act's (FLSA) minimum wage, overtime pay, recordkeeping, and child labor requirements. Of late, not only do employers have to worry about FLSA-based lawsuits from plaintiffs' lawyers, but that the DOL has become increasingly active in its own right.

According to the DOL website, the Wage and Hour Division's mission is "to promote and achieve compliance with labor standards to protect and enhance the welfare of the Nation's workforce." Most likely due to union and other political influences, the DOL is accomplishing this mission by stepping up enforcement activities of various targeted industries, including the senior living industry, taking on an activist role similar to the role that the National Labor Relations Board has taken. From audits to its own enforcement actions, the DOL is scrutinizing, suing, and monitoring employers. Employers should be aware of the DOL Wage and Hour Division's audit and enforcement activities, taking note of two recent developments in the wage and hour area.

◀ DOL Audits ▶

The DOL can audit employers at any time, although the most common reason for a DOL audit is a complaint from an employee. The DOL's Fact Sheet #44, which can be found on the DOL website, gives employers helpful information of what to expect when an investigator visits the workplace. Cooperating with the DOL is generally the best approach to take when you are audited.

A DOL investigator will contact you for the purpose of reviewing payroll and time records and interviewing employees to assure compliance with the FLSA. Quite often, investigators will just show up at your premises demanding to review documents and speak with your employees. Documents requested could include employee schedules, payroll records, 1099s, employee handbooks, time cards, company formation documents, organizational charts, employee lists, or accounts payable records.

Stand your ground. While being respectful and non-combative, ask the investigator to schedule a time with your counsel to coordinate interviews and document reviews. The investigator will usually comply. However, it is important that you and your on-site personnel know that investigators do not have to provide advance notice of on-site audits, do not need your consent, and may inspect records, conduct surveillance, take photographs, conduct employee interviews and issue and enforce subpoenas. Working through counsel should help to narrow the scope of documents and number of interviews and prevent missteps along the way that could derail an otherwise professional encounter.

If, after the audit, the DOL intends to issue a finding that the employer violated the FLSA and assesses back wages due, it will conduct a closing conference. Should you just pay the amount without question or seek to negotiate? Should you contest the accuracy of the findings? Once again, this is a time for you and your counsel to determine your next steps.

◀ Recent DOL Enforcement Actions ▶

Audits lead to lawsuits and, in this area, the DOL has broad powers. The most prevalent issues that we see in enforcement actions are unpaid overtime, off-the-clock work, and misclassification claims. Through the federal courts, the DOL can obtain injunctive relief, employer-paid third-party monitoring, penalties, unpaid wages, double damages, and interest. Employee statements are given great weight and employers at times will be unable to test those statements due to the DOL's ability to file declarations "under seal"—purportedly to protect employees from retaliation. Often, the DOL may issue a press release following an enforcement action, reporting the company name, the violations, and the amount the employer was required to pay. All violations can be found on a public, searchable database.

Here are a few examples of recent cases in California:

San Francisco, October 2014: A federal judge in San Francisco found Fatima/Zahra Inc. (doing business as

Lake Alhambra Assisted Living Center) and its owners and operators to be in contempt of a temporary restraining order the court had issued earlier. The court found that the business and its owners continued to retaliate against its employees during a Wage and Hour Division investigation. The case eventually settled with a \$330,000 consent judgment, payment of a year-long monitor, newspaper publication of the suit, and penalties.

San Francisco, December 2014: The DOL reached an agreement with owners of five Bay Area facilities who will pay \$637,048 in total to 24 employees providing care for elders. The amount includes \$318,524 in minimum wage and overtime back wages, plus an additional \$318,524 in liquidated damages.

Los Angeles, April 2014: The DOL has filed a complaint against the nursing home Oxnard Manor and its administrator after a Wage and Hour Division investigation determined that the employer violated FLSA's overtime, record-keeping, and anti-retaliation provisions.

Los Angeles, October 2014: C & H Collins-Hartwell Programs Inc. paid \$344,000 in overtime back wages and damages to 32 workers. A Wage and Hour Division investigation found that the employer violated the FLSA by failing to pay time and a half for hours worked beyond 40 in a work week. Collins-Hartwell operates day and residential programs.

Certainly, the best way to avoid FLSA lawsuits is to periodically self-audit your payroll practices for all your employees before the DOL audits you.

◀ The Next Frontier: 2015 and Beyond ▶

Senior living employers will face at least two new challenges in 2015 in the wage and hour area. In a March 17, 2014 presidential memorandum, President Obama announced that existing overtime regulations will be "modernized" and "streamlined." Last month, the DOL released its Fall 2014 Agency Rule List that includes a proposed rule to implement the President's directive on FLSA overtime exemption regulations, which most likely will further restrict the categories of employees that the exemptions cover. According to the Office of Information and Regulatory Affairs website, the DOL expects to publish the new rule by February 2015.

In addition to the possible changes to overtime exemptions, the DOL's Final Rule amending regulations regarding domestic service employment—78 FR 60454, October 1, 2013, which extends Fair Labor Standards Act (FLSA) protections to most home care workers—will become effective on January 1, 2015. Recently, the DOL made the following announcement:

"The Department has announced that it will publish a Federal Register notice announcing a time-limited non-enforcement policy. For six months, from January 1, 2015 to June 30, 2015, the Department will not bring enforcement actions against any employer as to

violations of FLSA obligations resulting from the amended regulations.

For the following six months, from July 1, 2015 to December 31, 2015, the Department will exercise prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities have made good faith efforts to bring their home care programs into compliance with the FLSA since promulgation of the Final Rule.

Throughout the 12-month duration of this policy, the Department will continue extensive outreach and technical assistance efforts, in particular with States regarding publicly funded home care programs.”¹

As can be seen, employers should be prepared for these two radical changes 2015 will bring to the already complicated wage and hour landscape. They should self-audit their record-keeping so that if a DOL investigator does perform an audit, the results will not be a surprise. ■

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¹ On December 22, 2014, U.S. District Court Judge Richard Leon vacated the third-party regulation amended by the *Home Care Final Rule, Home Care Association of America v. Weil* (Civil Action No. 14-967) (D.D.C.), and on January 14, 2015, he vacated the Final Rule's definition of companionship services. The Department of Labor has filed an appeal to the U.S. Court of Appeals for the District of Columbia Circuit and the Court of Appeals has ordered that the appeal proceed on an expedited schedule, which calls for briefing to be completed by early April.



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