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The Law@Work

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FLSA

On The Road Again: Are Your Travel Pay Practices Compliant with the FLSA & State Law?

By Nancy M. Barnes

During the Great Recession, many employers cut back on travel for all employees, and travel for non-exempt employees was almost non-existent. As the economy has improved, travel has ramped up again. As a result, employers should review their pay practices and policies to confirm that they comply with the Fair Labor Standards Act (FLSA) and applicable state law.

In general, the time it takes an employee to commute to work is not compensable working time under the FLSA. Employers sometimes mistakenly rely upon this rule to conclude that all travel to a work location is non-compensable; such a conclusion is perilous. If, for example, an employee is required to report to another location for a special one-day assignment or training, the time spent traveling to that new location is "work time," though the employer may deduct the amount of time that the employee normally spends commuting. In addition, time spent traveling from location to location during the work day is also counted as "hours worked."

When traveling away from home on an overnight trip, specific – and sometimes illogical – rules apply to time that must be compensated under the FLSA:

1. Travel that occurs during normal working hours must be compensated. For example, if an employee is normally scheduled to work from 9 a.m. to 5 p.m. Monday through Friday, she must be compensated for travel that occurs during those hours as well as any travel that occurs during those hours on Saturday or Sunday.
2. Travel that occurs outside of normal working hours (regardless of the day of the week) is generally not compensable provided that the employee is not doing work while traveling.

For more details on any of the topics covered in *The Law@Work*, please contact the authors via the links at the end of each article or Tim McDonald, editor-in-chief. For information on our Labor & Employment practice, please contact Stephen Richey, practice group leader.

3. If the employee is driving during the travel time outside of normal working hours, those hours are counted as hours worked. However, if the employee is traveling as a passenger in an airplane, train, boat, bus or car, that time is not compensable.
4. Meal breaks longer than 20 minutes that occur during compensable time do not have to be compensated.
5. Time spent sleeping by employees during an overnight trip is not subject to compensation.

To add an extra wrinkle to the analysis, employers should be aware that even if they do not have operations in California, if non-exempt employees travel there, they must be paid overtime and compensated in accordance with California's more generous wage laws. In *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011), the California Supreme Court ruled that California's overtime laws (which require the payment of overtime for time worked in excess of eight hours in a single day) apply to work completed by non-resident employees in the state of California. While the courts of California are well-known for their pro-employee tilt and desire to extend the reach of California law, employers would be wise to review the applicable law in all jurisdictions to which their non-exempt employees regularly travel to ensure that their pay practices are compliant with local requirements.

For more information, please contact Nancy Barnes or any member of our Labor and Employment group.

Other Recent Publications

Supreme Court Adopts Pregnancy Discrimination Claim Standard

DOL Rule Expands FMLA Coverage for Same-Sex Couples

New Cadillac Tax Guidance

Tackett Opens Door to Review & Modify Collectively Bargained Retiree Benefits

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Thompson Hine LLP has again has been honored in every category for game-changing innovation in *The BTI Brand Elite: Client Perceptions of the Best-Branded Law Firms.* The firm was ranked among the top five law firms nationwide in the category "Innovation: Client Service Strategists" – those making changes other firms are not to improve the client experience. In addition, Thompson Hine was named one of 25 leading firms nationwide in the category "Innovation: Movers & Shakers" – firms delivering new services that others are not. Thompson Hine is one of only 26 firms nationwide recognized in all innovation categories.

OSHA

Updated Guidelines for Preventing Workplace Violence

By M. Scott Young

On April 2, 2015, the Occupational Safety & Health Administration (OSHA) issued updated guidelines for protecting health care and social service workers from workplace violence. While OSHA's updated guidelines are directed at preventing violence against health care and social service workers, many of its recommendations are useful to employers in other industries.

OSHA's guidelines are promulgated to assist employers in complying with OSHA's General Duty clause, which requires that employers furnish to each of their employees employment and places of employment that are free from recognized hazards which cause or are likely to cause death or serious physical harm. Failure to comply with OSHA's General Duty clause can result in fines and citations.

In 2013, the Bureau of Labor Statistics reported that more than 23,000 significant injuries occurred due to assault at work. More than 70 percent of these assaults against employees occurred in health care and social service settings. Health care and social service workers face an increased risk of work-related assault by their patients, clients and/or residents. A smaller number – but still thousands – of assaults occurred against employees in non-health care and social service settings in 2013. OSHA's updated guidelines include industry best practices and highlight OSHA's views on the most effective ways to reduce violence in the workplace.

Risk factors cited by OSHA for workplace violence include poorly lit corridors, rooms, parking lots and other areas, and the lack of means of emergency communication for employees. Further, factors that may lead to violence against employees include contact with people who have a history of violence or abuse of drugs or alcohol, are gang members, or are relatives of patients or clients that have such characteristics. Organizational risk factors for workplace violence include the lack of facility policies and staff training for recognizing and managing escalating hostile and assaultive behaviors from patients, clients, visitors or staff. Additionally, requiring employees to work when understaffed, especially during mealtimes and visiting hours, as well as high worker turnover, can lead to workplace violence. Inadequate security and a perception that violence is tolerated and/or that victims will not be able to report an incident of violence to police or to press charges are organizational risk factors as well.

OSHA's guidelines recommend that employers develop written workplace violence prevention programs. Variations in these written programs will depend upon the employment settings where the programs are to be implemented. OSHA recommends that a written program include employee participation, worksite analysis for hazard prevention and control, safety and health training, record keeping and program evaluation. A workplace violence prevention program should have clear goals and objectives for preventing workplace violence. Several states have passed legislation and developed requirements that address workplace violence; in those states, employers should ensure that their workplace violence programs are compliant with state law as well.

OSHA recommends investigating any incident of workplace violence. The investigation should include what happened, when, where and how, and identify any root causes of the incident. Employees should be involved in the investigation. Employers should also investigate near misses.

OSHA also recommends that employers provide safety and health training to employees on workplace violence. Training on the employer's written workplace violence prevention program would be covered. This training can raise overall safety and health knowledge across the workforce, provide employees with tools needed to identify workplace safety and security hazards and address potential problems before they arise. The training should also make employees aware that violence is not tolerated by an employer and outline the steps for an employee to follow should he or she experience workplace violence, observe workplace violence, or observe a hazard that may lead to workplace violence. In addition, employees should be instructed on who needs to be notified in such circumstances both within and outside the employer (e.g., appropriate authorities), as may be appropriate.

For more information, please contact Scott Young or any member of our Labor and Employment group.

Health & Welfare

Employers Should Be Preparing Now for Form 1095-C Reporting

By Kim Wilcoxon

By January 31, 2016, applicable large employers will be required to send Forms 1095-C to verify certain information about the employer's 2015 health coverage. Form 1095-C will be used by the IRS to verify an individual's compliance with the Affordable Care Act individual mandate, to verify an employer's compliance with the employer "pay or play" rules, and to verify an individual's eligibility for a tax credit to reduce the cost of an insurance policy purchased through a Health Insurance Marketplace (also known as a state "Exchange").

Compliance with each of these requirements is determined on a monthly basis, so Form 1095-C will contain a month-by-month report regarding the health coverage offered to an individual and whether the individual and any dependents were actually enrolled in that health coverage. Because the form will contain an individualized month-by-month report, employers should understand the reporting requirements now to ensure that they will have the necessary data for accurate reporting in 2016.

What Is Form 1095-C?

Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, is an individualized statement that informs the employee and the IRS about the employer's health coverage. As with Forms W-2 and W-3, an employer will provide a Form 1095-C to each eligible recipient by January 31 following the reporting year and will transmit copies of those forms to the IRS with Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns.

Which Employers Must Provide Form 1095-C?

An employer must provide Form 1095-C if it is an applicable large employer under Internal Revenue Code Section 4980H (known as the "employer mandate" or the employer "pay or play" rules). Generally, an employer is an applicable large employer if it and other employers within its controlled group together employed an average of at least 50 full-time employees and full-time equivalent employees in the prior calendar year.

Note: Applicable large employers who employed an average of less than 100 full-time employees and full-time equivalent employees in 2015 can qualify for transition relief to delay application of the employer mandate until 2016. However, the reporting requirement is not also delayed. Employers who qualify for this transition relief **will** be required to provide a 2015 Form 1095-C to their full-time employees.

Each employer is responsible for providing Forms 1095-C to its employees. If multiple companies within the same controlled group participate in a single health plan sponsored by the parent company, reporting must nevertheless be done separately by each employer. While an employer may delegate the actual preparation and filing of the reports (for example, to the parent company or a vendor), the employer will ultimately be liable for any non-compliance.

Which Individuals Must Receive Form 1095-C?

An applicable large employer generally must provide Form 1095-C to any employee who is treated as a full-time employee under the Affordable Care Act and to any other employee or non-employee (including a retiree, a former employee enrolled in COBRA coverage, or a non-employee director) enrolled in self-insured health coverage offered by the employer during any month of the year.

> ***Note***: Because these forms must be provided to all employees who are considered full-time under the Affordable Care Act, an employer must understand the rules and regulations applicable to a determination of full-time status. Failure to understand these rules could cause the employer to misclassify an employee

and therefore be subject to a penalty for failure to provide a Form 1095-C.

If an employer offers affordable (under the federal poverty line safe harbor), minimum value coverage to an individual and any spouse and dependents for all twelve months of the year, the employer may give the individual a certification statement instead of a Form 1095-C. However, the employer will still be required to complete a Form 1095-C for that employee and submit the form to the IRS.

What Information Must Be Reported on Form 1095-C?

Form 1095-C contains three parts:

1. In Part I, an employer will be required to identify the recipient of the form and his employer.

2. In Part II, an employer will be required to use indicator codes to report whether the employer offered affordable, minimum value essential coverage to the employee, his spouse, and/or his dependents for each month of the year.

   Note: Part II communicates the extent to which an employer has satisfied its obligation under the employer mandate, so the accuracy of this Part will depend upon an employer's understanding of the rules and regulations applicable to the employer mandate. Failure to understand those rules could lead to an accuracy-related penalty for failure to correctly complete Form 1095-C and/or assessment of a penalty under Internal Revenue Code Section 4980H.

3. In Part III, an employer who offers self-insured health coverage must report the months during which an individual and each dependent was enrolled in the self-insured health coverage. An employer is not required to complete Part III for an individual if the employer does not offer self-insured health coverage or if the individual was not enrolled in the self-insured health coverage at any time during the year.

What Should an Employer Be Doing Now?

Applicable large employers should be tracking data now to ensure that it can be accurately reported in 2016. Additionally, employers should consider whether they have the knowledge and resources to prepare Forms 1095-C in house or whether they should outsource this function to a vendor. If using a vendor, employers should be carefully reviewing and negotiating service agreements to ensure appropriate allocation of responsibility and liability.

For more information, please contact Kim Wilcoxon or any member of our Employee Benefits & Executive Compensation or Labor & Employment practice groups.

Immigration

Long-Awaited Eligibility for Employment Authorization for Spouses of Certain H-1B Professionals

By Sarah C. Flannery & Staci M. Jenkins

Effective May 26, 2015, certain spouses of H-1B workers can apply for employment authorization. This expansion of employment authorization benefits was announced on February 24, 2015. The new regulations issued by the Department of Homeland Security are welcomed by H-1B workers, their spouses in H-4 status and many businesses who expect this change to influence retention of foreign talent.

H-1B workers are skilled professionals – including financial analysts, physicians, IT consultants and engineers – that businesses desire to retain. Granting employment authorization to H-1B workers' spouses in H-4 status will help retain H-1B workers by mitigating the risk that they will leave the United States because their spouses are unable to work.

Not all H-4 spouses will be eligible for employment authorization under these changes. The H-1B worker to whom the H-4 spouse is married must be pursuing employer-sponsored permanent residency. The two grounds of eligibility require a showing that the H-1B worker has either: (1) received an approved I-140 (an application that is part of the permanent residency process) or (2) been granted H-1B status for more than six years based on the pursuit of permanent residency.

This change will affect employers in the following ways:

- Current H-1B employees may apply pressure to their employers for permanent residency sponsorship because that sponsorship can create employment authorization eligibility for their H-4 spouses.
- Employers may see more foreign national talent in the labor pool as H-4 spouses obtain employment authorization.
- Employers may see requests from H-1B workers for support of the visa process to bring a spouse currently living abroad into the United States under H-4 status. The spouse may have continued living and working in the home country of the couple, and now that work authorization will be available in the United States, the family will seek unification here.
- Employers may have an alternative to permanent residency sponsorship in order to continue employment authorization of H-1B employees if those H-1B employees may be eligible for H-4 status with employment authorization. Until this change, dual H-1B couples needed to independently pursue permanent residency with their employers in order to continue employment authorization, but beginning next month, one spouse might be able to pursue the derivative status with employment authorization. There is risk associated with an H-1B worker moving to the derivative status, but it is now a risk that can be considered.

Please contact Sarah Flannery, Staci Jenkins or any member of our Immigration practice to discuss how this change may help your company's H-1B workforce as well as your company's global talent acquisition goals.

Traditional Labor

Get Ready for Ambush Elections

By Eric S. Clark

On April 14, 2015, new National Labor Relations Board (NLRB) rules became effective that substantially shorten the time period from the date a petition for certification is filed until the date of the election. It is estimated that the rules, proposed on February 4, 2014, shorten the time for the election from 42 days to 14-25 days.

The new rules include the following process and requirements:

- Election petitions, election notices and voter lists can be transmitted electronically. NLRB regional offices can deliver notices and documents electronically, rather than by mail.
- The regional director will generally set a pre-election hearing to begin 8 days after a hearing notice is served and a post-election hearing 21 days after the tally of ballots.
- Non-petitioning parties are required to identify any issues they have with the petition in their Statements of Position, generally one business day before the pre-election hearing opens.
- As part of its Statement of Position, the employer must provide a list of prospective voters with their job classifications, shifts and work locations to the NLRB's regional office and the other parties, generally one business day before the pre-election hearing opens.
- The purpose of the pre-election hearing is clearly defined and parties will generally litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Litigation of a small number of eligibility and inclusion issues that do not have to be decided before the election may be deferred to the post-election stage. Those issues will often be mooted by the election results.
- Parties will be provided with an opportunity to argue orally before the close of the hearing and written briefs will be allowed only if the regional director determines they are necessary.
- There will be no automatic stay of an election.
- The voter list will also include personal phone numbers and email addresses (if available to the employer). The employer must submit the list within two business days of the regional director's approval of an election agreement or decision directing an election.

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Similar Rules Proposed But Subsequently Invalidated in 2012

On April 30, 2012, the NLRB enacted rules that are essentially identical to the election rules that took effect on April 14, 2015. However, on May 14, 2012, a federal judge struck down those rules on the basis that they had not been enacted by a quorum of validly appointed NLRB members and were therefore invalid. The Supreme Court agreed with the rationale of that decision in the landmark case of *Noel Canning v. NLRB,* which was decided in June 2014. Importantly, the Supreme Court did not say that the rules were unlawful – the court simply held that there had not been a quorum in creating the rules, making them invalid.

Litigation & Legislation to Stop the New Election Rules

On January 5, 2015, the U.S. Chamber of Commerce filed suit in the U.S. District Court for the District of Columbia in an effort to stop the NLRB from moving forward with its new election rules. Although the Chamber filed a motion for summary judgment on February 5, 2015, the court has not yet ruled.

How Can You Prepare for an Ambush?

Before a petition is filed, unions actively campaign in favor of employees joining a union. Meanwhile, employers are generally silent on the issue until a petition is filed, so employees receive only one side of the story during this time period. Once a petition is filed, employers focus efforts on communication to the employees about what will happen if a union is elected to represent the employees. Using the 42-day election period to persuade employees, employers are able to correct the misinformation often disseminated by the union. By shortening this election cycle, the NLRB has

effectively reduced the employer's time to campaign against the union by approximately 50 percent.

With the new rules, employers cannot rely on the post-petition period to combat a union campaign. Instead, employers need to act now to educate Human Resources managers and supervisors on identifying the signs of union organizing. Employers would be wise to implement annual training of all HR managers and supervisors to ensure that an early detection program is in place. In some circumstances, additional tools may be required, including union vulnerability assessments, employee surveys, direct persuaders and employee training.

For more information, please contact Eric Clark or any member of our Labor & Employment practice group.