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Tripling concerns for health care employers

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Physicians and health care administrators whose attention has undoubtedly been focused on the financial implications of the Commonwealth's health insurance initiative must put a new legislative mandate on their radar screen.

In April, the state Legislature passed a bill that will soon make violations of the Massachusetts Wage Act subject to mandatory triple damages, even for inadvertent violations.

The Wage Act allows employees to seek redress for failures to timely pay wages, including regular wages, overtime pay, prevailing wages, vacation pay and commissions. In addition, employers may violate the Wage Act if they have improperly classified workers as independent contractors rather than as employees – and will now be subject to triple damages for each of those improper classifications.

This change in the law has particular relevance to health care providers because of the varied ways in which they meet their workforce needs: through the use of independent contractors, per diem employees and leased employees, for example.

The change, contained in Senate Bill 1059, will become effective in Massachusetts as of July 13.

This amendment requires courts to award all successful state Wage Act plaintiffs three times the amount of lost wages or benefits claimed. For example, a $10,000 claim would require a $30,000 payment by the employer. This change in the law takes away the discretion that judges previously had with regard to when to award triple damages.

Even good-faith mistakes, not just violations that were intentional or willful, could cost employers three times as much as the mistake itself. And if a single error results in Wage Act infractions with respect to a number of employees, an employer is liable for triple damages for each one of those mistakes.

What about independent contractors?

Further complicating the situation for physicians and other health care providers is how the new law indirectly affects independent contractor classifications.

Generally speaking, the Wage Act does not apply to independent contractors. But infractions stemming from employers' improper classification of Wage Act employees as independent contractors are subject to the new law, making it critical that employers re-evaluate the status of consultants and other individuals who technically may be employees for Wage Act purposes.

A physician group practice or other health care organization faces an uphill battle if it is sued for alleged Wage Act infractions regarding a worker classified as an independent contractor. The legislation, case law and a recent advisory opinion from the Attorney General concerning independent contractors presume


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that work arrangements are employer-employee arrangements, and a business that has classified a worker as an independent contractor must be prepared to meet a strict three-part test to overcome the presumption that such a worker is an employee.

The analysis is complicated, but a quick overview of the test's components may help health care organizations begin to think about this issue and how their workers should be classified.

First, an independent contractor must be free from the employer's control and direction in performing his or her work. A contract or job description may say that the worker is free from the employer's control, but that is not enough – the actual relationship between the business and the contractor must bear that out. To be free from an employer's direction and control, a worker's activities and duties should be carried out with minimal instruction.

Second, the service provided by the worker must be outside the employer's usual course of business. A worker whose services form a regular and continuing part of the employer's business is usually considered an employee rather than an independent contractor.

Third, the worker must be customarily engaged in an independent trade, occupation, profession or business of the same nature as the service performed for the employer.

Employers need to be concerned about worker classification not only because of the new legislation and exposure to triple damages for Wage Act violations, but because the classification implicates other laws.

If a health care provider improperly classifies an employee as an independent contractor, the organization could face not only actions under the Wage Act, but also actions under the minimum wage laws, laws regarding withholding taxes on employee wages and workers' compensation provisions.

How does the new legislation affect your organization?

Many health care employers utilize "independent" labor to meet the changing demands of health care.

For example, a mid-sized physician practice group may employ a number of part-time or specialist nurses or technicians. Many home health care businesses use independent contractor physical therapists and occupational therapists to provide services to clients in their homes. Although you may deem these individuals to be independent contractors, because they are not part of your ordinary workforce, under the strict standards described above, some may actually need to be treated as employees.

What about exceptions?

Some employers, including hospitals supported by the Commonwealth, cities and towns, and those that give free treatment or act as a public charity, may be exempt from the Wage Act and the new provisions. Some cooperative associations may also be exempt as to shareholders who are also employees. It is important to evaluate whether these exceptions may be applicable to your company.

What should your organization do now?

Because of these Wage Act amendments, it is more important than ever for employers, particularly health care employers who may utilize a number of independent contractors, to avoid violations of the Wage Act. Wage Act claims have been on the rise in Massachusetts in recent years, and will only increase with this new legislation.

The Commonwealth's numerous wage and hour statutes are technical and intricate, and their application is often confusing and in some cases contradictory.

We strongly recommend that physicians, health care administrators, and other health care professionals consult with their counsel and conduct a careful and detailed audit of the classification of their employees and other pay practices.

Thoughtful analysis of policies, practices and worker classifications is the best way to avoid violations and the new automatic and highly costly penalties attached to them.

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