

HEALTHCARE WAGE & HOUR EXPOSURE AND THE COVID-19 PANDEMIC

CONTACT

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ON YOUR TEAM.

Not all superheroes wear capes. With more than [130,000 people](#) in the United States hospitalized from COVID-19 in a single week in January 2021, today's superheroes wear a stethoscope and PPE. Even in these extraordinary circumstances, our frontline healthcare workers are subject to fair work standards set forth by the U.S. government and healthcare employers are subject to claims and enforcement action.

This article examines how Wage & Hour exposures have been impacted due to COVID-19 and what employers need to know to mitigate their risk of claims.

WAGE AND HOUR ENFORCEMENT

Before digging into the issues surrounding Wage & Hour (W&H) exposure in the era of the COVID-19, let's revisit exactly who oversees W&H statute compliance and where these types of claims can come from. W&H enforcement falls within the purview of the Department of Labor, specifically within the Wage & Hour Division (WHD).

WHD's mission is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. WHD enforces federal minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act. WHD also enforces the paid sick leave and expanded family and medical leave requirements of the **Families First Coronavirus Response Act (FFCRA)**, the Family and Medical Leave Act, wage garnishment provisions of the Consumer Credit Protection Act, and a number of additional statutes, employment standards and worker protections as provided in several immigration related statutes.¹

As you can see, the scope of WHD's oversight spans well beyond the typical meal breaks and overtime pay issues we tend to think about when speaking of Wage & Hour exposure. To take it a step further, oversight of compliance with the provisions of the recently announced FFCRA also fall within the purview of WHD's oversight.

COVID-19 AND HEALTHCARE WORKFORCE IMPACTS

When considering the potential impact of W&H on the healthcare industry specifically, consideration must be given to the dynamics of this segment throughout the various stages of the pandemic.

First, the media reports of hospitals being overrun with symptomatic patients in need of life-saving care, a trend that only grew more severe as the pandemic spread across the nation. This overrun on capacity strained not only the equipment resources of our healthcare system, but often called for our frontline providers to put in unprecedented hours to provide necessary care to all those in need.

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Second, the tremendous pressure put on the pharmaceutical and life sciences industries to not only develop an effective vaccine in what was considered an impossibly short timeframe, but to also continue to manufacture and distribute the necessary personal protective equipment (PPE) required to slow the spread.

In all aspects of this national effort to slow the spread and minimize the impact of the pandemic, many different strains were put on the healthcare industry workforce, including:

- Maxed out bed capacity at hospitals
- Quarantining of infected staff
- Family care responsibilities of staff
- Safety concerns (staff with pre-existing conditions or susceptibility)
- Furloughs
- Layoffs
- Reduced hours
- Remote working requirements

The immediate impacts of these strains are obvious as remaining staff in various roles supporting this industry are being asked to do more and work longer hours, potentially pushing the bounds of compliance with basic overtime, meal and rest period requirements for non-exempt employees. What's more important is to look at the not so obvious derivative impacts that many of these strains can cause.

1. Discrimination. As noted above, FFCRA is within the purview of the WHD, and within this statute there have been various temporary amendments made to the basic FMLA rights of employees as well as to the obligations employers have to allow paid leave in varying circumstances (family care provision for those infected, child care and education, safety concerns, etc.) While some of these issues can be addressed with work from home protocol or various CDC precautionary tactics, these protocols must be rolled out in a compliant, non-discriminatory and un-biased way consistent across the entire organization.

2. Independent Contractor Benefits. As W2 employees are furloughed or laid off from their jobs, they typically begin collecting unemployment. Often, healthcare providers employ both W2 employees and independent contractor employees. Unfortunately, independent contractors don't always have the same unemployment rights as W2 employees and can find themselves out of work without pay.

This can cause frustration and potentially a dynamic where independent contractors question their rights and more importantly the classification their employers had them in. In many circumstances, the IRS guidance on who can be classified as a W2 employee vs. an independent contractor can be rather ambiguous.^{2,3} As states begin to audit claims, and independent contractors begin to evaluate their positions, systemic issues could be identified.

Care must also be given to exactly how employers assist impacted W2 employees vs. independent contractors with obtaining unemployment benefits where available. Under FFCRA, many states are making unemployment available to independent contractors or gig workers where they can show documented earnings. Employers can be a great deal of help in this regard,⁴ or can be a substantial hindrance potentially causing further exposure to claims for negligence in the provision of consistent corporate policies or wrongful supervision.

3. Workplace Safety. Workplace safety concerns with employers unknowingly skirting the bounds of CDC compliance as they race to handle added volume and create a potentially unsafe working environment for their staff. Collaboration between Occupational Safety and Health Administration (OSHA) and WHD can create addition statutory exposure in this regard.⁵

Law firms are beginning to track COVID-19 litigation. Through the majority of 2020, more than 400 employment-related COVID-19 lawsuits have been filed, with the trend only increasing. The majority of cases have been filed in California, Florida, New Jersey, New York and Texas. The most frequently filed claims involve discrimination, leaves of absence and work-from-home issues. Some states have enacted liability shields to protect employers that act in good faith from coronavirus claims, but the federal government is still debating nationwide legislation, leaving this a substantially nascent issue.⁶

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MARKET TRENDS

There is general concern amongst carriers over the rising trend in EPLI litigation and Wage & Hour claims. This trend, coupled with record low interest rates and a decade-long trend of market softening until mid-2019, has put extraordinary pressure on pricing. This pressure will need to continue to address not only historical shortfalls in combined ratios, but new trends like the pandemic and resulting exposures.

Markets are more frequently seeking to limit exposure to layoffs, RIFs and furloughs, either with higher SIRs or with outright exclusionary language applicable to discriminatory practices related to COVID-19. The breadth of this new language is an ongoing issue. As carriers across the market seek to limit coverage, retailers and brokers must constantly evaluate how the new restrictions preclude coverage. In response, they will need to work to soften language or apply retroactive coverage when the new language has the potential to eliminate coverage for wrongful acts or alleged wrongful acts that may have already taken place, but have not yet come to the attention of the insured's risk management team.

RISK MITIGATION STRATEGIES

As is typically the case when dealing with the fear of the unknown from a risk management standpoint, the best reactions are built off proactive risk mitigating strategies. The formation of a pandemic compliance committee with collaboration between management, legal and HR is integral in staying abreast of and communicating constant changes in compliance requirements coming from the various regulatory stakeholders referenced.

The importance of training management in how to effectively communicate with their staff and implement various operational tactics cannot be overstated. Having these plans clearly documented, regularly reviewed and clearly communicated in a consistent and regular manner will not only help organizations identify issues or concerns, and correct them proactively, but it will most importantly reinforce an organizations mission of looking out for the wellbeing and preservation of their most valuable asset, their people!

SUMMARY

The COVID-19 pandemic has, and continues, to put strain on the healthcare industry, causing new and increased Wage & Hour exposure. It's important for retailers to understand this evolving exposure to help their insureds develop a risk mitigation strategy and put proper coverage in place should a claim arise.

AmWINS has brokers across the country dedicated to Professional Lines coverages for the Healthcare industry. Our specialists have the expertise and market relationships to help you navigate this, and many other, complex insurance issues.

SOURCES

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² Employment Law Worldview (July 2020). DOL Update: COVID-19-Related Guidance and New Opinion Letters (US). <https://www.employmentlawworldview.com/dol-update-covid-19-related-guidance-and-new-opinion-letters-us/>

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⁴ National Employment Law Project (March 2020). Independent Contractors and COVID-19: Working Without Protections. <https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/>

⁵ Occupational Safety and Health Administration. Memorandum of Understanding Between the U.S. Department of Labor Occupational Safety and Health Administration and Employment Standards Administration Wage and Hour Division. <https://www.osha.gov/laws-regs/mou/1990-04-05>

⁶ SHRM (August 2020) These Coronavirus-Related Workplace Issues May Lead to Lawsuits. <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/these-coronavirus-related-workplace-issues-may-lead-to-lawsuits.aspx>

