Common Medical Practice Employment Law Mistakes

Here's how to avoid them.

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Busy medical practices must navigate a complex web of federal and state laws every day. However, the bread-and-butter employment law issues that affect businesses in all industries often are lost in the mix of payer contracts, reimbursement issues, and patient satisfaction concerns. This article presents some of the most common mistakes that medical practices make.

Common Wage and Hour Mistakes

One common struggle for practices is properly counting employees' hours worked for purposes of calculating regular and overtime compensation. The Fair Labor Standards Act (FLSA) establishes, among other things, an overtime compensation requirement for most employers in the United States (29 U.S.C. § 201(a)). This requirement provides that employees who do not meet an FLSA exemption ("non-exempt employees") must be compensated at one and half times their regular rate for time worked in excess of 40 hours during a single workweek (29 U.S.C. § 201(a)(2)(C)). U.S. Department of Labor regulations make clear that it is the employer's responsibility to ensure that accurate time records are maintained (29 C.F.R. § 516.2(a)).

In recent years, employers have faced suits from aggrieved employees claiming unpaid overtime for time worked that was not reflected in time records. Federal courts generally agree that employees' entitlement to compensation for such "off the clock" work depends on whether the employer knew or should have known that the employee worked overtime and was not compensated for it (Allen v. City of Chi., 865 F.3d 936, 943 (7th Cir. 2017)). Practices should work with counsel to take steps to limit exposure to these types of claims.

If a practice is found to have misclassified an employee as an independent contractor that practice could be liable for, among other things, unpaid payroll taxes and back overtime wages.

At a minimum, employers should adopt policies requiring employees to obtain pre-approval for working overtime and set reasonable procedures for employees to report overtime worked. Note that even if an employee fails to obtain advance approval for overtime, in most cases, it is advisable to pay them for that time and use the opportunity to counsel them about complying with practice policy. Additionally, since time worked off-site can be just as compensable as time worked in the office, practices should also limit the ability of non-exempt employees to work outside of regular business hours. Practices should consider restricting remote access to email and other electronic resources so that workers cannot work during off hours without express permission.

Practices also should ensure that non-exempt employees are properly compensated for time spent in training or other similar activities. FLSA regulations provide that such time almost always must be counted as compensable time worked. In fact, training time is always compensable unless all of the following criteria are met: "(a) attendance is outside of the employee's regular working hours; (b) attendance is in fact voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance" (29 C.F.R. § 785.27).

In many cases, non-exempt employees also should be compensated

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for time spent on work travel. While normal travel between home and work is not compensable time, time traveling to another city on a special one-day assignment is compensable (29 C.F.R. § 785.35; 29 C.F.R. § 785.37). Travel that is part of the employee's principal job is compensable time (29 C.F.R. § 785.38). When an employee takes an overnight work trip away from home, he should be compensated for any travel time that occurs during his normal working hours and even the corresponding hours on his non-working days (29 C.F.R. § 785.39). Notably, even if these rules provide otherwise, a non-exempt employee must be compensated for time spent actually performing work while traveling (29 C.F.R. § 785.41).

Finally, practices should review the wage and hour laws of the states in which they operate. Many states have enacted their own laws that are even more protective of employees than the FLSA.

Misclassifying Independent Contractors

Practices sometimes deem a portion of their workforce to be independent contractors rather than employees. Although these arrangements may seem easier to administer and can have numerous tax and wage advantages, they often are fraught with legal danger. If a practice is found to have misclassified an employee as an independent contractor that practice could be liable for, among other things, unpaid payroll taxes and back overtime wages.

Various tests are used by regulators and courts to determine whether an individual is properly classified as a contractor. For federal income tax law purposes, the analysis hinges upon the level of behavioral and financial control the business exerts over the individual and how the business and the individual perceive their interaction with one another. IRS Publication 15-A (2018), Employer's Supplemental Tax Guide. To determine whether an individual is an employee under the FLSA, federal courts look to factors such as the degree of control over the individual's work, the permanence of the working relationship, the degree of skill required for the work, and the worker's investment in equipment, material, or his or her own workers (McFeeley v. Jackson St. Entm't, LLC, 825 F.3d 235, 241 (4th Cir. 2016); Baystate Alt. Staffing v. Herman, 163 F.3d 668, 674-75 (1st Cir. 1998)).

Some states have adopted a version of what is known as an "ABC test." These tests presume that a worker is an employee unless: (a) the worker is free from control and direction in connection with work performance; (b) the worker is performing a type of work that is outside of the hiring entity's usual business; and (c) the worker is performing for the hiring entity the type of work in which he or she is customarily engaged (Dynamex Operations W., Inc. v. Superior Court, 4 Cal. 5th 903, 955-56 (2018); Mass. Ann. Laws ch. 149, § 148B(a)).

As regulators and plaintiffs' attorneys continue to focus on the misclassification of independent contractors, practices would be wise to review these relationships for compliance with the independent contractor tests that apply in their jurisdiction.

Reasonable Accommodation for Disabilities

The Americans with Disabilities Act (ADA), which applies to employers with 15 or more employees, requires employers to provide reasonable accommodation to qualified employees and job applicants who have a disability (42 U.S.C.S. § 12112(b)(5)(A)). A reasonable accommodation for an employee is a modification or adjustment to the work environment or employer processes that enable an employee with a disability to perform her essential job functions or allow her to enjoy equal benefits and privileges of employment (29 C.F.R. § 1630.2(o)(1)). Examples of reasonable accommodation include job restructuring, modified schedules, and modification of work equipment (29 C.F.R. § 1630.2(o)(2)). An accommodation that would impose an "undue hardship" on the employer is not required by the ADA (42 U.S.C.S. § 12112(b)(5)(A)). An "undue hardship" is an action that requires significant difficulty or expense when considered against a number of factors such as the cost of the accommodation and the employer's financial resources (42 U.S.C.S. § 12111(10)).

Most practices are well aware of their obligation to provide accommodations such as a larger computer monitor for an employee with vision impairment or frequent food breaks for an employee with diabetes. However, many practices are surprised to learn that the ADA may require periods of unpaid leave for employees with disabilities. This required leave often stretches beyond the allotment required under the Family and Medical Leave Act (FMLA). And unlike the FMLA, which caps an employee's unpaid leave entitlement for health conditions at 12 weeks per year, the ADA does not establish a maximum and definite period of leave for a qualifying employee (29 U.S.C.S. § 2612(a)(1)).

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Instead, employers must decide the point at which leave becomes an undue hardship on their operations. The EEOC's position is that "…indefinite leave—meaning that an employee cannot say whether or when she will be able to return to work at all - will constitute an undue hardship, and so does not have to be provided as a reasonable accommodation."[1] Although it is clear that indefinite leave is not mandated, the amount of leave that is required is a subject of much debate in the courts. One federal appeals court has held that leave of more than six months for a professor with cancer imposed an undue hardship on a university (Hwang v. Kan. State Univ., 753 F.3d 1159 (10th Cir. 2014)).

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Another federal appeals court could not definitively conclude that a six-month leave for lupus constituted an undue hardship (Cleveland v. Fed. Express Corp., 83 F. App'x 74, 81 (6th Cir. 2003)). A third federal appeals court added to the confusion by holding in 2017 that a "multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA" (Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 478 (7th Cir. 2017)).

Practices should train personnel to recognize that unpaid leave may be required as an accommodation under the ADA. However, because determining the length of required leave depends on a number of factors, such as the specific limitations created by an employee's disability, the resources of the employer, and the state in which the employee is working, practices should work closely with counsel when analyzing these issues.

Discrimination and Job Interviews

A job interview is a useful tool in assessing an applicant's knowledge, experience, and ability to thrive under pressure. However, interviewers must be trained to avoid lines of questioning that could put a practice in legal jeopardy. A real-life illustration of what can happen when an interview goes off the rails may be found in the case of Alawi v. Sprint Nextel Corp., 544 F. Supp. 2d 1171, 1173 (W.D. Wash. 2008). In that case, a Yemeni applicant who was a practicing Muslim applied for an account executive job with a cell phone provider. The sales manager who interviewed the applicant allegedly discussed religion at length during the course of the interview.

At one point, the interviewer allegedly asked the applicant if her name was Hawaiian and inquired whether it was true that all Muslims have "jihad in [their] heart…" The applicant was not hired for the position. The applicant filed suit alleging that the defendant unlawfully failed to hire in violation of, among other statutes, Title VII of the Civil Rights Act of 1964 (Title VII). Title VII prohibits workplace discrimination on the basis of race, color, national origin, religion, or sex (including marital status). The federal court hearing the matter permitted the case to go forward to trial in part because of the alleged prolonged conversation about the applicant's Yemeni national origin and her Muslim faith.

To avoid catastrophic interviews such as the one alleged in Alawi, practice personnel handling interviews should script questions that are focused only on an applicant's qualifications for the job and do not unnecessarily touch on protected classes such as race, national origin, religion, sex, age, or disability. Questions that do not meet that standard should be eliminated from the list. Many questions are obviously inappropriate, but some may inadvertently lead to information that should not be considered during the hiring process. For example, an interviewer would likely know not to directly ask about an applicant's religion, but questions about the applicant's participation in civic activities may very well lead an applicant to disclose her religious affiliation.

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Instead, the interviewer should ask about an applicant's membership in trade groups that are relevant to the job opening. Similarly, an interviewer should avoid questions about an applicant's spouse or children, because those questions may evidence an employer's intent to discriminate on the basis of marital status, in violation of Title VII. Instead, the interviewer may ask if the applicant has commitments which make him or her unable to work the scheduled hours, as long as such a question is asked of all applicants.

Practices need to be particularly mindful when drafting interview questions that could touch on an applicant's disability. Federal law specifically prohibits a business from making inquiries about presence, nature, or severity of an applicant's disability before any conditional offer of employment is made (42 U.S.C.S. § 12112(d)(2)(A)). Therefore, direct questions about whether an applicant has a disability or indirect questions about an applicant's past illnesses, injuries, or work absences should be avoided. Note, however, that even before a conditional offer is extended, an interviewer is permitted to ask about the applicant's ability to perform job-related functions (42 U.S.C.S. § 12112(d)(2)(B)).

Conclusion

American humorist Sam Levenson once said, "You must learn from the mistakes of others. You can't possibly live long enough to make them all yourself." Practices should take the above common mistakes to heart. To head off those and other employment law concerns, practices leaders should be trained in the basics of wage and hour, discrimination, and benefits laws, and engage qualified counsel when issues arise. **PM**

Reference

[1] Employer-provided leave and the Americans with Disabilities Act. EEOC.gov. www.eeoc.gov/eeoc/publications/ada-leave.cfm. Accessed September 11, 2018.

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