Recently, the Wage and Hour Division of the U.S. Department of Labor has been “cracking down” on employers who are in violation of the Fair Labor Standards Act. In fiscal year 2003, the agency collected over $212,537,554 in back wages, an increase of 61% from 2001.

The DOL has been targeting industries with a history of chronic violations, especially those with low-wage earners. In 2003, among the low-wage industries most frequently investigated by the DOL were health care facilities, with 2177 reported cases. During an investigation, the DOL has the authority to enter and inspect your premises and records (e.g., records of dollar volume of business transactions, payroll and time records), as well as interview employees to determine whether any person has violated any provision of the FLSA.

If an agreement is not reached on correcting any alleged violations, the Secretary of Labor or an individual employee or group of employees may file a lawsuit to collect past due wages, liquidated damages, interest, attorney fees and costs.

While employers often are unaware that pay practices are in violation of the FLSA, most problems can be detected through a review of payroll records and procedures. Common violations often include:

- treating all salaried employees as exempt
- allowing off-the-clock work
- not paying for time spent changing into uniforms (donning and doffing)
- lack of adjustments for unused meal breaks
- making automatic meal deductions
- uncompensated travel time
- allowing “voluntary” work by employees
- failure to include bonuses in overtime
- providing “comp time” in lieu of overtime
- misclassifying employees as exempt
- improper docking of exempt employees’ salaries (shortages, partial day absences, disciplinary reason)

Developments On The New Overtime Regulations for Exempt Employees

New amendments to the overtime exemptions for “white collar” employees, effective on August 23, 2004, simplify the criteria for determining when employees are exempt from overtime pay under the FLSA. Opponents of the amendments claim they would eliminate overtime for millions of individuals by reclassifying them as exempt workers. In contrast, Department of Labor projections tend to show that many workers will become eligible for overtime pay for the first time.

On September 10, 2004, Alfred B. Robinson, Jr., Acting Administrator for the Wage and Hour Division, issued the following statement in an effort to clarify the current situation regarding congressional efforts to reverse the effects of the new DOL overtime regulations:

“The Department’s new Overtime Security rules remain in effect, despite congressional efforts to prevent funding for enforcement efforts. These rules guarantee and strengthen overtime protections for millions of workers including workers earning less than $23,660 annually, police, fire fighters, other first responders, hourly workers, blue collar workers, and workers under a collective bargaining agreement. We will continue to ensure that overtime protections remain in place so that workers know their rights and employers know their responsibilities.”

DOL Fact Sheet on Nurses and the Exemptions

The new regulations affect the exempt status for a number of categories of health care facility staff. To assist health care employers in their proper classification, the DOL has issued Fact Sheet #17N for Nurses, and Fact Sheet…

Wage and Hour Compliance
As New FLSA “FairPay” Regulations Take Effect, Investigations and Claims Are on the Rise

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reading into new territory on wage and hour law for the home health care industry, a federal appeals court in New York has ruled that home care workers employed by third parties to provide in-home companionship services are covered by the overtime and minimum wage provisions of the Fair Labor Standards Act.

Parting ways with all other federal appeals courts, the U. S. Court of Appeals for the Second Circuit determined that the regulation issued by the Department of Labor exempting home health care aides employed by third-party companies or agencies is unenforceable. For employers of home health aides in New York, Connecticut and Vermont, home care workers now will be entitled to overtime compensation for hours worked in excess of 40 in a work week based on their regular rate of pay. [Coke v. Long Island Care At Home, Ltd., No. 03-7666 (2d Cir. July 22, 2004).]

A “home health-care attendant” brought this self-titled “test case” with the support of legal counsel from the Service Employees International Union. She alleged she was denied overtime and a minimum wage by her employer, and she was seeking to invalidate FLSA regulations regarding the exemption for companionship services.

The FLSA requires that employers pay domestic service hourly employees overtime pay at the rate of one and one-half times their regular wage for hours worked in excess of forty in any single work week. However, the FLSA exempts from overtime pay employees who engage in “babysitting” and “companionship services.” Specifically, the exemp-
tion applies to “any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are delimited by regulations of the Secretary [of Labor]).”

The regulations define domestic service employment as “services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed.” Companionship services are defined by the regulations as “those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: Provided, however, [t]hat such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.”

Prior to this decision, employees of third-party health care providers of companionship services to the aged and the infirm in private homes were not covered by the FLSA under this exemption, and their employers were not required to pay them overtime pay based on their regular rate of pay for hours worked in excess of 40 per week. [Note: State laws, such as the New York wage and hour law, require that such employees be compensated at the rate of time and one half the minimum wage for all hours worked over 40 in a work week.]

However in this case, the Second Circuit reversed the decision of the United States District Court for the Eastern District, which had deferred to both the federal and state regulations and rejected the individual’s claim. In contrast to the trial court, the appeals court examined the enforceability of the Department of Labor regulations under two different levels of agency deference. The appeals court granted deference to the first regulation defining the companionship exemption, upholding and affirming the enforceability of the regulation. However, the appeals court found the second regulation, which addressed the application of the exemption to employees of third parties, unenforceable. Such an application of the regulation is contrary to its intention and inconsistent with other regulations and agency positions, the court said. Since the intention of the regulation

--- continued on next page ---
was to exempt companions, individuals employed by agencies or other third party employers to provide home health care needs should not be exempt, the court concluded.

While other federal appeals courts have considered various aspects of the companion exemption, none has ruled on the application of the exemption to employees of third party employers, noted the Second Circuit. Other decisions dealt with the definition of “private homes” and the exception for “trained personnel” and otherwise were distinguishable on procedural grounds.

What the Case Means for Home Health Care Providers
As a result of the ruling in the Coke case, companies employing caregivers that meet the definition of “companion” and are within the jurisdiction of the U.S. Court of Appeals for the Second Circuit (New York, Connecticut, Vermont) must now compensate those employees for overtime work at one and one-half times their regular hourly rate of pay. Along with the obvious increased financial burden, it now becomes even more critical for affected employers to record accurately hours worked and to calculate properly the amount of overtime pay due to eligible employees. The stakes have risen dramatically for home health care employers which find themselves out of compliance in their pay policies and practices.

Given the genesis of the complaint in this case, it goes without saying the SEIU and other unions active in the health care field will be watching home care providers with renewed interest in how they are paying their staff. In New York, the 1199 SEIU’s “Invisible No More” campaign targeting employers of home health aides has already engineered a strike primarily over the issue of wages, with the result being a graduated increase in the hourly wage – and now also in the overtime rate -- for many agency employees.

On the heels of the SEIU’s annual convention where it declared an intent to increase its activist role through the “New Unity Partnership” to combine union resources and build the membership base, the decision in this case provides another lever for exerting pressure on employers outside the traditional recognition and representation process. (For more information on the New Unity Partnership, see related article in this issue.)

If you have questions about this decision, other wage and hour matters, or how unions are using government agencies and the courts in corporate campaigns against health care employers, please contact the attorney with whom you regularly work, or Paul Siegel, (631) 247-4605, SiegelP@jacksonlewis; Felice Ekelman, (212) 545-3005, EkelmanF@jacksonlewis.com.

Labor Relations
SEIU Vows Renewed Emphasis on Targeted Organizing Using Local Tactics and Funding

At its 2004 convention, the SEIU adopted an ambitious organizing plan for the next four years calling for members in union strongholds to help organize workers in other states.

The organizing strategy, dubbed the “United Strategy for Strength,” and approved by convention delegates, calls for local unions and divisions of the international to join together in organizing workers in targeted states, including a number that currently have few SEIU members. The organizing plan targets the states of Connecticut, Illinois, Oregon, Washington, Massachusetts, Maryland/District of Columbia, Michigan, Pennsylvania, Florida, and Puerto Rico to achieve the same level of unionization as the states of California and New York, which have 60% of the SEIU’s 1.7 million members. In addition, the union intends to put resources into organizing the South and Southwest including Alabama, Arizona, North Carolina, and Texas.

Health Care Focus on Union Locals, Member Volunteers
As part of the grassroots focus of the plan, each local union in the more densely unionized areas have pledged blocks of time, staff, and money to help organize workers in less unionized areas and will send member volunteers into those areas to carry out the plans. The health care division members pledged a total of 1,568 hours per month to organize in their own city and 170 weeks outside their state. The long term care division pledged to target home care workers employed by private agencies and to step up efforts to win neutrality agreements as part of contract negotiations with already unionized employers.

In addition to stepped up organizing efforts, the health systems division decided to unite around one national plan to raise standards for pay, benefits, staffing, and quality care by negotiating “standard-setting” agreements with national for-profit hospital chains. In the nonprofit sector, the union pledged
to develop outreach strategies to workers, patients, and communities, and to seek the cooperation of Roman Catholic and other faith-based health systems.

Much of the funding for the health care division initiatives is to come from the SEIU’s Unity Fund to which local unions contribute $5 per member per month. In addition, locals have been asked to allocate 20 percent of their individual budgets for organizing.

Each local union is expected to develop a specific plan by Jan. 1, 2005, to assist in carrying out the division strategies. To give the pledges teeth, the SEIU delegates voted to amend the union constitution to provide a penalty procedure for locals that fail to implement the 20 percent organizing commitment or to spend budgeted funds for the benefit of the health care division objectives. If found to have failed, the union’s international executive board could order the local to pay all or a portion of the following year’s annual organizing budget to an organizing campaign in that division.

Dennis Rivera, president of 1199 New York and chair of the Health Care Division, said the four-year plan of action “leaves no doubt whatsoever that we are determined and committed to changing the way the American health care system works. We will make life better for our members and we will guarantee affordable health care for everyone.” The SEIU’s website has more details about its aggressive organizing plans, as well as specific reports from the Health Care and Long Term Care Divisions on those plans through 2008. http://www.seiu2004.org/division/healthcare/

**SEIU Leadership Adopts Shake Up Approach**

Despite the highest win rate in 16 years in elections conducted during 2003, AFL-CIO affiliated unions continued to lose members as the percentage of unionized private sector workers slipped. However, the SEIU was the most successful, winning 75 percent of the representation elections in which it participated in 2003, and the health care industry remains near the top of that list.

Continuing to hammer on what was dubbed “priority number one,” the SEIU again put the goal of organizing new members front and center during its 2004 convention. In addition to the initiatives described above, the SEIU has launched a new recruitment-oriented “virtual union” website named www.PurpleOcean.org. The site is a major element in the union’s plan to recruit one million new members and borrows the concepts used by the AFL-CIO with its information gateway to work-related issues, www.WorkingAmerica.org. Beyond its own borders, the SEIU leadership also is participating in the New Unity Partnership with four other union leaders to shake up the AFL-CIO, which they have called a fortress of ineffectiveness and self-interest.

**Learn How Lawfully to Preserve Management Rights**

The SEIU has committed to an aggressive four-year campaign to organize health care workers within targeted geographic regions. Jackson Lewis will present a program specifically designed to assist health care employers preserve management rights in the face of this aggressive campaign.

October 26, 2004; 9:00 am - 5:00 pm
Doubletree Hotel Philadelphia
237 South Broad Street
Philadelphia, Pennsylvania

Please visit the Events page of our website, www.jacksonlewis.com, for more information, or contact Executive Enterprises Institute, at (800) 831-8333.
employees did not have a right to have a co-worker present at an investigatory interview that might lead to discipline. The Board's decision was based largely on policy issues underlying an employer's need to conduct confidential and discreet investigatory interviews in the workplace. The Board specifically recognized that employers must be able to conduct fact finding interviews in "sensitive situations" and that the confidentiality of such interviews cannot be compromised, concluding, “This can best be accomplished by permitting an employer in a non-union setting to investigate an employee without the presence of a co-worker.”

Despite rolling back the right to representation, the Board clarified that nonunion employees do have the right to request the presence of a co-worker at an investigatory interview, which might result in disciplinary action, and that an employee cannot be disciplined for making such a request. However, where employees are not represented by a union, employers have no obligation to accede to such a request.

In light of the IBM Corp. decision, employers should reexamine their policies and practices concerning how they conduct employee investigatory interviews.

Employee Benefits

Department of Labor Issues Final COBRA Notice Regulations

On May 26, 2004, the Employee Benefits Security Administration (formerly the Pension and Welfare Benefits Administration) of the U.S. Department of Labor issued final regulations regarding the timing and content requirements of various notices that must be furnished by employers, plan administrators, workers and their families in connection with group health continuation coverage - commonly referred to as COBRA coverage. (See “DOL Issues Final COBRA Notice Regulations” in the Summer 2004 Preventive Strategies and posted online May 27, 2004.)

The final regulations were issued in four parts:

- General COBRA Notice;
- Employer Notice of Qualifying Event;
- Qualified Beneficiary Notices; and
- Plan Administrator Notice Obligations.

Employers that sponsor group health plans subject to COBRA's continuation coverage requirements will need to review and update their current COBRA notice forms and summary plan descriptions, as well as review existing procedures to determine where changes are needed.

The final regulations are effective for any obligation to provide a COBRA notice occurring on and after the first day of the plan year beginning after November 26, 2004 (January 1, 2005 for employers with calendar-year group health plans). The plan year is determined from the group health plan’s governing documents. If the plan year is not specified, the annual period for determining deductibles and limits will generally apply.

The required content of the general notice is essentially unchanged by the final regulations -- it should contain the basic information about COBRA that employees and their families need to know to protect their rights before a Qualifying Event occurs. The final regulations contain a model general notice that will be deemed to be in compliance with the content requirements of the regulations.

The final regulations make two significant changes regarding distribution of the general notice:

- The notice must generally be provided to a covered employee and a covered spouse no later than 90 days after coverage begins. (NOTE: This is the same period during which a summary plan description (SPD) is generally required to be provided to new enrollees).
- The general notice may be included in the SPD, provided the SPD is furnished to the covered employee and any covered spouse within the 90-day time limit.

The final regulations provide that where Qualified Beneficiaries are required to provide notice to the plan administrator of a Qualifying Event (as described above) or notice of a social security disability determination, plans must establish reasonable procedures for providing the notice. The procedures will be deemed reasonable under the regulations if they:

- are included in the plan's SPD; and
- specify (i) who has been designated to receive the notice, (ii) the means for giving the notice, and (iii) the required content of the notice in order for the plan to provide continuation coverage rights.

Note that in the absence of established reasonable procedures, a default rule permits a Qualified Beneficiary (or representative) to satisfy the notice requirement by providing oral or written notices to any person customarily handling employee benefit matters, and if the benefits are administered by a regulated insurance organization, notice to any unit of the insurance organization that handles benefit claims.

Notice to any officer of that insurance organization is also acceptable under the default rule.
The final regulations contain extensive provisions describing the required content for a COBRA election notice. The election notice should contain all of the information individuals need to decide whether to elect COBRA coverage. For example, the election notice must describe:

- the particular Qualifying Event and the name or status of Qualified Beneficiaries eligible to elect COBRA coverage;
- the date coverage will terminate (or has terminated) in the absence of an election;
- premium payment requirements, including the due dates for payments and the consequences of non-payment;
- the procedures for electing COBRA and the consequences of failing to elect COBRA;
- how COBRA coverage could be extended due to disability or a second qualifying event; and
- the name of the plan and contact information for the person responsible for COBRA administration.

The final regulations add the following required notices:

- Notice of Unavailability of Coverage. If the plan administrator receives notice of a Qualifying Event, second Qualifying Event, or social security disability determination from any individual and determines that the individual is not entitled to continuation coverage, the plan administrator must, within 14 days from receipt of the notice, provide the individual with a written notice of unavailability, explaining the reasons why the individual is not entitled to elect continuation coverage. For example, if the plan administrator denies COBRA coverage after receiving a late notice of divorce, the plan administrator must provide the individual with a written notice of unavailability.

- Notice of Early Termination of COBRA Coverage. If a Qualified Beneficiary's COBRA coverage is terminated earlier than the maximum time period for which COBRA must be made available (e.g., the employee fails to timely pay the COBRA monthly cost), the plan must notify each affected Qualified Beneficiary in writing of the early termination date, the reason for the termination, and the availability of any alternative group or individual coverage under the plan, such as conversion rights. The early termination notice must be provided “as soon as reasonably practicable.”

What Should Health Care Employers Be Doing?

The final regulations require the following employer actions:

- Revise general COBRA notice and election notice (or use model forms provided in final regulations).
- Create new notices for unavailability of coverage and early termination of coverage (model forms not provided in final regulations).
- If applicable, verify with outside COBRA vendors that their timetables for providing the required COBRA notices comply with the final regulations.

Employers should also consider taking the following actions:

- Update SPDs to include reasonable procedures for Qualified Beneficiary notices.
- Create a form to be used by Qualified Beneficiaries to give notice of a Qualifying Event.
- Review overall COBRA compliance procedures.

The Jackson Lewis Employee Benefits Practice Group has developed integrated documents to ensure that an employer complies with its obligations under the final regulations. The group is available to provide assistance and training with implementing the new forms and policies. For more information, please contact the attorney with whom you regularly work, or one of the following Benefits Practice Group attorneys:

Bruce Schwartz, (914) 514-6126, SchwartB@jacksonlewis.com;
Robert Perry, (914) 514-6118, PerryR@jacksonlewis.com;
Allan Friedland, (860) 522-0404, FriedlaA@jacksonlewis.com;
Joseph Lazzarotti, (914) 514-6107, LazzaroJ@jacksonlewis.com.

Workplace Safety
Nursing Homes Earmarked for Site Specific Targeted Inspections

Continuing its six-year long program of site specific targeted inspections, the Occupational Safety and Health Administration in 2004 has been focusing on approximately 4,000 high-hazard worksites for unannounced comprehensive safety and health inspections. Using injury and illness data collected during the agency’s 2003 Data Initiative, OSHA will inspect nursing homes and personal care facilities in this year’s program. For the past two years, those facilities were covered under a separate
National Emphasis Program that addressed specific industry hazards. Those hazards, including ergonomic stressors relating to resident handling, bloodborne pathogens/tuberculosis, and slips, trips and falls, will continue to be the primary focus of inspections in nursing and personal care facilities under the site specific targets.

Designating which employers to inspect first, the agency uses a primary list that includes health care facilities reporting 15 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time workers (known as the DART rate). The primary list will also include sites based on a “Days Away from Work Injury and Illness” (DAFWII) rate of ten or higher (ten or more cases that involve days away from work per 100 full-time employees). Employers not on the primary list who reported DART rates of between 8.0 and 15.0, or DAFWII rates of between 4.0 and 10.0, will be placed on a secondary list for possible inspection. The national average DART rate in 2002 for private industry was 2.8, while the national average DAFWII rate was 1.6.

Respiratory Protection Standard Will Be Enforced as Scheduled

SHA has confirmed that it will enforce the July 1, 2004 effective date for the general respiratory protection standard to protect health care workers against tuberculosis. Health care industry groups, including the American Hospital Association and the Association for Professionals in Infection Control and Epidemiology, had lobbied the agency to delay the standard’s implementation, while labor unions had appealed to OSHA to move forward. OSHA has yet to issue a compliance directive or memo to the field related to the standard, but a spokesman told BNA July 2 that additional guidance to the field will be forthcoming.

More information on compliance with the respiratory standard as it applies to protecting health care employee from tuberculosis may be found in the agency’s July 30, 2004 memorandum to regional administrators on tuberculosis and respiratory protection located on the OSHA website, www.osha.gov. For assistance or questions, please contact the Jackson Lewis attorney with whom you regularly work, or one of the Workplace Safety Practice Group coordinators: Ed Foulke, (864) 232-7000, FoulkeE@jacksonlewis.com; Roger Kaplan, (631) 247-0404, KaplanR@jacksonlewis.com.

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