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34th annual WORKFORCE MANAGEMENT BRIEFING

High Stakes and High Priorities

A Bitter Pill to Swallow Increased Workplace Issues in a Demanding Health Care Delivery System

Thursday, October 15, 2015
New York Hilton Midtown
New York, NY

Your Workplace. Our Business.®

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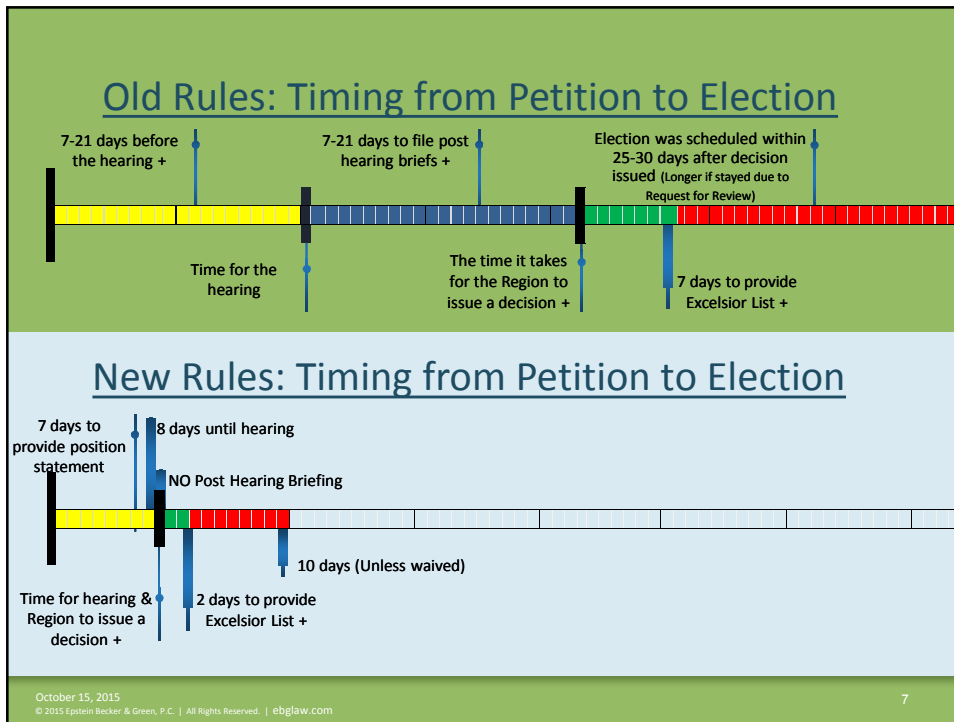
Agenda

- **NLRB Developments**
- **Wage and Hour Issues in Health Care**
- **Alternative Staffing Arrangements**
- **Unique Issues with Per-Diem and Part-Time Workers**
- **M&A and Other Transactions**
- **Other Emerging Issues**

NLRB Developments

NLRB Developments

- **NLRB Extends Its Reach**
 - NLRB expands its view of protected concerted activity
 - NLRB expands its interpretations of what is lawful in employer policies
- **The Changing Definition of “Employers” and “Unions”**
 - Non-traditional organizing
- **Micro-Bargaining Units**



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Advice to Employers: Prepare Now

- **Begin and Continually Campaign Starting Now**
 - Conduct regular trainings
 - Regularly release messages to employees
 - Evenly enforce all labor-related policies
- **Prepare Now (Six Actions Because You May Only Have Seven Days)**
 1. Policy review/creation
 2. Supervisor training
 3. Employee relations and education
 4. Putative bargaining unit analysis
 5. Vulnerability audits
 6. “Break glass” planning

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Wage and Hour Issues in Health Care

Labor and Staffing

- **Conflict Between Wage and Hour Requirements and Health Care Regulations**
 - Staffing ratios (contractual or statutory)
 - Meals and rest periods
- **Regular Rate Issues**
 - Negotiated on-call pay
 - Shift and other differentials
- **Education Leave**
- **Companionship Services Exemptions**

Potential Threat Area

OFF THE CLOCK			
"Pre-Shift and Post-Shift" Compensation	Changing Into Uniform <i>Donning & Doffing</i>	Training	Work Outside of Work
<p>Such activities are compensable if they are "an integral and indispensable part of the principal activities" of a job</p> <ul style="list-style-type: none"> • Required paperwork/charting • Mandatory meetings • Giving Reports 	<p>Changing at work is compensable if required by law, the employer, or the nature of the work.</p>	<p>Compensable unless all the following elements are met.</p> <p>Time spent is</p> <ul style="list-style-type: none"> • Voluntary • Not job related • Outside normal work hours • No other work is concurrently performed 	<p>Checking E-Mails</p> <p>Offsite Access</p> <p>Communication with Supervisors</p> <p>Work-Related Phone Calls</p> <p>Required Testing</p>

Alternative Staffing Arrangements

Alternative Staffing

- **Joint-Employment Issues**
- **Independent Contractor Status – DOL Enforcement**
- **Physician Staffing Arrangement**
- **Corporate Practice of Medicine Issues**



NLRB: *Browning-Ferris* Decision

- **What Is the New Standard?**
 - If the decision is upheld and followed, no longer will the Board need to find that an employer retains and exercises direct control over another employer's employees to be liable as a joint employer of those employees
- **What Is the New Test for Finding a Joint Employer?**
 - Under the new standard, what matters is whether the purported joint employer *possesses* the authority to control the terms and conditions of employment, either directly or indirectly
- **What Should Employers Do Now?**
 - Employers should closely examine their relationships with those who provide them with temporaries and other contingent workers, and their contracts and relationships with those other businesses that provide integral services and support, to assess whether there is a vulnerability to findings of joint-employer status

Department of Labor (“DOL”) Administrators Interpretation

- **On July 15, 2015, the DOL issues interpretation 2015: “The Application of the Fair Labor Standards Act’s ‘Suffer or Permit’ Standard in the Identification of Employees Who Are Misclassified as Independent Contractors”**
 - Provides an “expansive definition” of “employment,” broader than under the common law control test
 - Considers “most workers are employees under the FLSA”
- **Under this definition, “workers with economic independence who are operating a business of their own” may be classified as independent contractors; “[o]n the other hand, workers who are economically dependent on the employer, regardless of skill level, are employees covered by the FLSA”**
- **The DOL endorsed the use of the six-factor “economic realities” test to determine employment status**
- **This guidance only pertains to independent contractors under the FLSA**

Per-Diem and Part-Time Workers

- **The Affordable Care Act now sets the standard**
 - An employee who works 30 or more hours per week is considered full-time
 - Two measurement methods for determining full-time status:
 - Monthly measurement method
 - Look-back measurement method
 - Employers may make additional employees eligible for coverage or otherwise offer more expansive coverage
- **In the past, per-diem workers had received higher pay in lieu of benefits—now may have to give benefits to per-diem workers**
 - May be easier for hospitals to be less reliant on per-diem workers
 - This is important to communicate to operations in unionized facilities
 - Keep this in mind when developing new plans and in negotiations

Sick Leave Laws

Current States and Cities with Paid Sick Leave Laws	
California (effective July 1, 2015)	Irvington, NJ
Connecticut	Passaic, NJ
Massachusetts (effective July 1, 2015)	Paterson, NJ
San Francisco, CA	Trenton, NJ
Oakland, CA	New York, NY
Washington, DC	Portland, OR
Bloomfield, NJ	Eugene, OR
Jersey City, NJ	Philadelphia, PA
Newark, NJ	Seattle, WA
East Orange, NJ	Tacoma, WA
Montclair, NJ	

M&A and Other Transactions

M&A and Other Transactions

- **Changes in Health Care Impacting the Labor & Employment Industry:**
 - **Affordable Care Act**
 - Changes in the delivery of health care
 - Changes in the reimbursement of health care services
 - Medicaid expansion
 - Impact on employers
 - **Result**
 - Increased regulatory compliance
 - Increased transactional activity
 - Mergers, acquisitions, and consolidations
 - Joint ventures
 - Affiliations

M&A and Other Transactions

■ Key Factors to Consider

- Regulatory compliance/increased government scrutiny and enforcement
 - Changes in health care regulations (e.g., minimum staffing ratios and wage and hour compliance; increased movement of delivery of care to outpatient setting and impact on staffing plans, compensation, and CBA compliance; employer mandate and rollout of Cadillac Tax and impact on staffing plans and employee benefits; and OSHA)
- Transactional issues
 - Board oversight and due diligence, transaction structure, and successor liability
 - Indemnification, escrow, holdbacks, and guarantees
 - Approvals

M&A and Other Transactions

- Transaction issues are prevalent with an uptick in mergers, acquisitions, consolidations, affiliations, and joint ventures in last five years, post-Affordable Care Act, as providers try to leverage size and market share to better compete
- **Impact on Employers**
 - Employer mandate and impact on workforce/staffing plans, etc.
 - Rollout of Cadillac Tax and impact on workforce benefits (e.g., increased use of narrow networks, etc.)

Other Emerging Issues: Disability Leave & Accommodation, OSHA, and Whistleblower Issues

Disability Leave & Accommodation

- **Best Practices**
- **Patient Care vs. Proper Staffing**
- **Increase in the Number of Disability Claims**
- **Accommodation Requirements**
 - e.g., Lifting may be a basic job requirement—no light duty
- **Leave Laws**
 - e.g., Leave as an accommodation
 - Operational aspects of putting nurses on leave

Occupational Safety & Health Administration

The New Health Care Enforcement Initiative

On January 25, 2015, the Occupational Safety and Health Administration (“OSHA”) created a daunting new compliance challenge for inpatient hospitals and nursing homes. Specifically, Dorothy Dougherty, Deputy Assistant Secretary of Labor for Occupational Safety and Health, announced the details of OSHA’s new health care enforcement initiative in a memorandum to OSHA Regional Administrators and State Plans that provides “Inspection Guidance for Inpatient Healthcare Settings” (“guidance memo”).

Seven Health and Safety Hazards that OSHA Plans Should Focus on During Inspections

1. Musculoskeletal disorders (MSDs) relating to patient or resident handling
2. Workplace violence
3. Bloodborne pathogens
4. Tuberculosis
5. Slips, trips, and falls
6. Exposure to multi-drug resistant organisms such as MRSA
7. Exposures to hazardous chemicals, such as sanitizers, disinfectants, anesthetic gases, and hazardous drugs

Whistleblower

■ More Opportunities in Health Care for Whistleblower Situations

- Traditional employment issues
- Medicare/Medicaid abuse
- Proper patient care and staffing

■ Responding to “Whistleblowers”

- Hotlines
- Investigations



QUESTIONS