SESCO management consultants

Staff Recommendation

Questions and Answers – Missouri Alliance for Home Care

WAGE-HOUR

Question: Do employers have to pay employees to attend a State required, 2-day orientation program where the employees do not perform any work, do not displace any other employees, and obtain certification for the State which can be used to obtain similar employment?

Answer: No, if certain requirements are met.

Under the Fair Labor Standards Act ("FLSA"), employers must pay their employees at least a specified minimum wage for each hour worked and overtime for hours worked in excess of forty in a workweek. Time spent attending employer sponsored lectures, meetings, and training programs is generally considered compensable. However, the Department of Labor ("DOL") regulations implementing the FLSA provide an exception to this general rule.

DOL regulations provide that attendance at lectures, meetings, training programs and similar activities need not be counted as working time, and therefore does not need to be compensated, if four criteria are met:

- Attendance is outside of the employee's regular working hours;
- Attendance is in fact voluntary;
- The program is not directly related to the employee's job; and
- The employee does not perform any productive work during such attendance.

As for the second criterion, the reason why attendance by an employee is not voluntary must be examined. Where an employer (or someone acting in its behalf or interest) either directly or indirectly requires an employee to undergo training, the time so spent is clearly compensable. The employer in such circumstances has usurped and controlled the employee's time, and must pay for it. Where the State has required the training, however, a different situation arises. If the State-required training is of general applicability, and is not tailored to meet the particular needs of individual employers, the DOL has taken the position that the FLSA does not require the second criterion to be met.

As for the third criterion, the DOL has taken the position that such training need not be compensated if it corresponds to courses offered by independent bona fide institutions of learning. In training of this type, where the employee is the primary beneficiary, the DOL has taken the position that the third criterion does not have to be met.

The FLSA does not preempt State regulations or rules which are more beneficial to employees. As such, it needs to be determined whether the State regulation or rule requiring the orientation may require the employer to pay for the time spent in the orientation; if it does, that State regulation or rule would govern.

SESCO does recommend that the individual sign and date an agreement that they understand the training is vlountary and unpaid. SESCO ca assit with this suggestion.

Question: How can an employer create an orientation program where it is not required to pay employees?

Answer: To ensure that attendance at the orientation program is not considered compensable time, an employer must do the following in establishing the program.

First, the program must take place outside of the employee's regular working hours. No part of the program should cut across the employee's anticipated, regular working hours.

Second, the employee must not perform any productive work while attending the program.

Third, while attendance at training will generally be compensable time if attendance at the program is not voluntary (i.e., required), this not the case with a program that is composed of State-required training, is of general applicability, and is not tailored to meet the particular needs of individual employers. To ensure that the program is "not tailored to meet the particular needs of individual employers", specific information related to the employer's policies or practices should not be included.

Finally, while attendance at training will generally be compensable time if it is directly related to the employee's job, this is not the case with a program that corresponds to courses offered by independent bona fide institutions of learning. The program must be of the type that would be offered by independent institutions in the sense that the courses provide generally applicable instruction which enables an individual to gain employment with another employer. As such, the DOL would regard the training as primarily for the benefit of the employee and thus not compensable.

Question: Do employers have to pay employees if employees are able to obtain a waiver form from their previous employer?

Answer: Likely no, but we need more information.

To answer the question of whether an employee providing documentation that they previously completed a similar State-required orientation program is nonetheless required to complete the orientation program offered by the employer, we would need more information. Specifically, it would need to be determined whether the State rule or regulation requiring new employees to complete the orientation program allows for waiver of this requirement upon satisfactory proof that it was completed previously. If waiver is permitted, it would need to be determined if there are any completion date requirements (must have been completed within the last 5 years, etc.).

However, we recommend that all new employees be required to attend the program. This will ensure compliance. If the program is established to comply with the previously stated requirements, employees attending the program will not need to be compensated.

EMPLOYEE CLASSIFICATION

Question: If state law does not require employers to provide employees with workers' compensation insurance coverage, does this affect how the business properly distinguishes between individuals who are employees from individuals who are independent contractors?

Answer: No.

The importance of properly classifying individuals as employees or individual contractors cannot be stressed enough. Simplifying worker classification has become a major business demand and Congress has considered, but not passed legislation.

Common Law Test. Under common law (law developed through judicial decisions rather than decreed by statute), the key to a worker's status involves determining whether the worker is subject to the control of the business with regard both to what must be done and how it must be done. Basically, the common law test examines whether the business has the right to control and direct the worker who is performing the services. If the business directs only the results of what is being accomplished—not the means by which those results are to be achieved—then the worker may be an independent contractor. The focus of the common law test is whether the business has the legal right to control the "what" and "how" of the worker's services, not whether the business ever actually exercises control. As long as the business has the right to control the results, ways, and means of the worker, even if it never actually exercises that right, the common law test is satisfied and the worker is likely an employee. Whether the right does or does not exist is determined by reviewing the circumstances in the particular situation.

IRS' 20-Factor Test. The Internal Revenue Service (IRS) also bases a worker's status on the business's right to control how work is to be performed. To help determine whether a worker is an employee or an independent contractor for

withholding purposes, the IRS has developed a 20-factor control test based on common law principles. The factors indicate the degree of control over the worker that is sufficient to establish an employer-employee relationship.

Neither the common law test nor the IRS' 20-factor test look at whether the individual is provided workers' compensation insurance coverage. Whether a worker is covered by workers' compensation insurance coverage is irrelevant to the determination of whether the amount of control the business exercises over the worker is sufficient to establish an employer-employee relationship.

Question: If state law does not require employers to provide employees with workers' compensation insurance coverage, will employers be responsible in any way for work-related injuries sustained by employees?

Answer: Yes.

In states that require employers to provide employees with workers' compensation insurance coverage, if the employee sustains a work-related injury their recovery is limited by their state's workers' compensation law.

In states that do not require employers to provide employees with workers' compensation insurance coverage, if the employee sustains a work-related injury their recovery is only limited by the private civil action they seek through the state judicial system. These civil actions generally must relate to reckless or intentional action (tort) or inaction (negligence) of the employer that caused the injury. If successful, the court may award a broad range of damages. These damages may include, but are not limited to, medical expenses, lost wages, compensation for permanent injuries, punitive damages, and pain and suffering. Additionally, in the event of the employee's death, the court may award damages to the dependents of the employee.

SESCO/MAHC Hotline

The SESCO team including labor law attorneys are avaivable at no charge to answer any HR/Labor law questions from members. There is no time limit associated with the service. If` you have any further questions on this Q/A or any other HR/Labor Law question contact SESCO at the numbers/email below.

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