New York Hospitals Targeted in Wage & Hour Class Actions and DOL Audit Initiatives

A few weeks ago, we contacted you about our belief that New York area hospitals and healthcare institutions were being targeted in wage and hour class actions and DOL audits. Since then, many New York healthcare workers have been contacted by Thomas & Solomon LLP, a plaintiffs' law firm based in upstate New York that recently sent direct mail solicitations to employees of a number of New York City hospitals claiming that hourly paid employees may be "owed back wages" and asking employees to call a toll free number or complete an "information sheet" to report about their employment experiences. The solicitations also invite employees to respond via the firm's website, www.hospitalovertime.com, which contains an ever growing list of hospitals that the firm reportedly is "investigating."

Coupled with the United States Department of Labor's recent announcement of an audit initiatives targeting healthcare employers (for which they have hired additional personnel to support increased enforcement activity) this presents a real threat for New York area hospitals and healthcare institutions. To further your understanding of these initiatives and to help you gain insight about how similar institutions are responding to these challenges, we invite you to a roundtable discussion at the offices of Seyfarth Shaw on April 1, 2010 (please see attached invitation).

This current action by Thomas & Solomon is part of a nationwide trend in which major hospital systems in multiple jurisdictions are being named as defendants in class and collective action wage and hour lawsuits by competing plaintiffs' law firms. The complaints, often recycled from one jurisdiction to the next, challenge the healthcare industry's pay practices, specifically taking aim at the use of so-called "automatic" meal break deductions. Plaintiffs allege that healthcare providers fail to pay for missed and interrupted breaks, and improperly compensate for other off-the-clock work performed, for example, before and after scheduled shifts. The named plaintiffs, often former employees, typically seek to represent all current hourly paid employees in many job classifications, as well as those former hourly paid employees who worked at the hospital during the applicable limitations period. In some cases, plaintiffs name hospital presidents and senior human resources executives as individual defendants, and allege racketeering and benefits violations in addition to wage and hour claims. These cases typically begin with an "investigation" of the sort that is now underway against many area hospitals, during which plaintiffs' counsel attempt to recruit employees via websites, toll-free telephone numbers, direct mail solicitations, and targeted telephone contact to entice them to commence or join planned lawsuits.

Seyfarth currently represents many healthcare systems in wage and hour litigation, and presently is defending more than ten of these cases in Massachusetts, Illinois, Michigan and California. In addition to those cases, we know the plaintiffs' lawyers and their tactics from many other wage and hour class actions in which we are defense counsel, so we are very familiar with their litigation strategies and style. We have put together a working group of attorneys with wage and hour class / collective action and healthcare experience to provide integrated best practice legal advice to our clients.

Because of this depth of experience, we are able to identify and assess specific core issues quickly, establish a cogent strategy to defend against the plaintiffs' claims, utilize innovative case management

techniques, and provide quality legal expertise while maximizing the benefit of our prior experience in similar cases and staffing cases cost-effectively. We are able to provide unique alternative fee arrangements and budgets to ensure that our clients understand and anticipate litigation expenses as early in the case as possible, and we use technology solutions to provide exposure analyses with as little disruption as possible to our clients' organizations, and to assist, when needed, with electronic data preservation and e-discovery issues.

Based on that body of experience, we believe there are a number of measures that can be taken to protect healthcare employers and reduce the exposure posed by the issues raised in these lawsuits. While this letter does not provide the appropriate forum for discussing those measures in detail, we can observe that any healthcare employer would be wise to undertake a review of its wage and hour practices to ensure the greatest possible degree of legal compliance. Healthcare facilities may also be in a position to communicate with employees in a way that may help them better understand the nature of any pre-suit "investigations," and perhaps decrease employees' level of interest in initiating or joining litigation by making them more comfortable with the facilities' wage and hour practices.

The time for taking such steps is now because, even setting aside the actual threat that these lawsuits pose, the Department of Labor recently announced its focus on the healthcare industry. The DOL noted that, according to its studies, many New York healthcare employers that it investigated over the past several years were not in full compliance with federal wage and hour laws. Our colleagues and the leaders of our Government Strategies practice group, the Honorable Victoria A. Lipnic, former U.S. Assistant Secretary of Labor for Employment Standards, and Alexander J. Passantino, former Acting & Deputy Administrator for the Wage & Hour Division of the U.S. Department of Labor, tell us to expect stepped up agency enforcement activity as well as further lawsuits.

Please join us on April 1 for a roundtable discussion of these issues.