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Healthcare Employers On The Defensive: The Continuing Threat of Class Action Lawsuits and Regulatory Scrutiny of Overtime Practices for Nurses

By William P. Schurgin and Jason J. Englund

Over the past decade, healthcare employers have faced a wave of wage and hour lawsuits challenging common industry pay practices for nurses and other workers. Many healthcare providers continue to defend against a variety of overtime suits. Over the same time period, the United States Department of Labor ("DOL") has worked to expand the overtime protections of the Fair Labor Standards Act ("FLSA") and has been increasingly active in conducting enforcement investigations targeting the overtime pay practices of healthcare providers. Recent settlements resulting from DOL investigations include a $4 million settlement on behalf of over 4,500 nurses and hospital technicians who claimed they were not paid the proper amount of overtime. *See* U.S. DOL W Release No. 13- 1852-DAL. Similarly large settlements have been struck in state and federal class action litigation across the country.

The surge of wage and hour litigation and regulatory activity has hit healthcare providers at a time when the industry's efforts to control costs, improve efficiencies, respond and adjust to healthcare reform legislation, and retain employees are being tested more than ever before. Long-term care and home healthcare providers, in particular, have been a target of increased DOL scrutiny. As the wave of overtime litigation continues, it is critical that employers monitor these developments and ensure that nurses and related employees are classified and paid correctly.

Focus on "Automatic" Meal Break Deductions

The vast majority of these overtime lawsuits filed allege that hourly paid nurses and other employees routinely perform work "off-the-clock" for which they are not properly compensated. The complaints most often focus on healthcare employers' use of a so-called "automatic" meal break deduction, which assumes that the employee received an entire uninterrupted unpaid meal period. The DOL takes the position that an employee does not need to be compensated for a "bona fide" meal period, but an employee must be completely relieved from duty during a meal period which ordinarily should be at least 30 minutes in duration. *See* 29 C.F.R. §785.18 (2009). The lawsuits allege that when timekeeping systems are structured to build in an assumption that full meal breaks will be taken, they result in a deduction from employees' pay when the employee has, in fact, not received an uninterrupted meal break, allegedly resulting in failure to pay for work in excess of forty hours per week.

Plaintiffs also frequently allege that healthcare employees are not compensated for work performed before and after scheduled shifts and for mandatory training time. *See, e.g., Giles v. St. Charles Health Sys., Inc.*, No. 13-cv-00019 (D. Or. Oct. 22, 2013). State law claims are another mainstay of this type of lawsuit, as many states require meal breaks for certain employees by statute or regulation.

The class and collective action complaints filed against healthcare providers in these actions are often recycled from one healthcare employer and jurisdiction to the next, and are devoid of allegations specific to the named plaintiff or the defendants being sued. Recently, federal courts have increasingly rejected such vague allegations and have required plaintiffs to plead specifically that they worked more than 40 hours in a given workweek without being compensated. *See, e.g., Davis v. Abington Memorial Hospital*, 765 F.3d 236 (3rd Cir. 2014); *Lundy v. Catholic Health System of Long Island, Inc.*, 711 F.3d 106 (2d Cir. 2013). The case law is not consistent among the Circuits, however, and the Supreme Court has not addressed the degree of specificity required to state an FLSA claim. Accordingly, while some baseless overtime claims on behalf of nurses and other healthcare professionals may be weeded out at the pleadings stage, plaintiffs' lawyers continue to file these suits.

Misclassification Claims

While the majority of overtime suits on behalf of nurses and other healthcare workers have targeted pay practices for hourly workers, healthcare providers may also face suits challenging the classification of nurses who are treated as exempt under the FLSA. Under the relevant DOL regulations, registered nurses generally meet the learned professional exemption to the FLSA if they are licensed with the appropriate state examining board and are paid on a salary or fee basis, but the regulations specifically exclude licensed practical nurses from the exemption. 29 C.F.R. § 541.301(e).

Professional certification is not by itself sufficient to support classification as exempt, however, because exempt status also depends on the duties actually performed by the nurse and whether the nurse is paid on a salary basis. In recent years, even registered nurses have challenged their exempt status by arguing that they do not spend the majority of their time on patient care. *See, e.g., Rieve v. Coventry Health Care, Inc.*, 2012 U.S. Dist. LEXIS 58603 (C.D. Cal. Apr. 25, 2012). Other suits have challenged whether exempt healthcare workers meet the salary basis test if they are paid a fee that varies according to the time it takes to complete the work. *See Rindfleisch v. Gentiva Health Servs.*, 2013 WL 4494375 (N.D. Ga. July 26, 2013). Healthcare employers should thus carefully consider the duties and payment arrangements of nursing professionals who are classified as exempt, even if the title has traditionally been deemed exempt under the regulations.

Proposed Changes to Overtime Rules

In addition to the threat of class action suits, healthcare employers should closely monitor the proposed revisions to the FLSA's "white collar" exemptions to the FLSA, which could have a profound impact on healthcare providers. On July 6, 2015, the DOL issued proposed changes that would raise the threshold salary for the white collar exemptions from its current level of $455 per week ($23,660 annually) to $970 per week ($50,440 annually), with additional increases each year thereafter. Exempt healthcare professionals who currently earn less than $50,000 per year will be directly impacted if the proposed regulations are adopted. In addition, while the DOL has not proposed changes to the "duties tests" of the exemptions, the DOL has invited comment on a series of questions, including whether to adopt a bright-line test requiring employers to pay overtime to employees who devote more than 50% of their time to nonexempt work. Healthcare providers should act now to evaluate the impact these potential changes may have on exempt nurses and other healthcare professionals.

The Companionship Services Exemption

Another FLSA exemption impacting certain healthcare providers is the companionship services exemption. This exemption generally applies to employees who provide care and protection to individuals who, due to age or infirmity, are unable to care for themselves. The regulations exclude work performed by a registered or practical nurse from the exemption, but home healthcare providers have long relied on the exemption to exclude other home healthcare workers from coverage of the FLSA. In October 2013, the DOL issued a final rule eliminating third-party providers of home care services from the exemption and narrowing the definition of services qualifying as "companionship services." These changes would in effect eliminate the ability of most employers to use the exemption. However, before the regulations were set to take effect in January 2015, a

district court vacated the DOL's final rule, finding that the regulations contravened the language of the exemption in the text of the FLSA. *See Home Care Ass'n of Am. v. Weil*, No. 14-cv-00967, 2014 WL 7272406 (D.D.C. Dec. 22, 2014.) The DOL has appealed the ruling, leaving the future scope of the companionship services exemption in doubt.

Preparing For Potential Litigation

While the legal landscape governing overtime pay remains in a state of flux, the wave of overtime litigation and DOL scrutiny continues. It is recommended that every employer review its wage payment practices. Long-term care providers should periodically review wage and hour policies and pay practices in all areas, including employee classification, meal periods, and work performed before and after a scheduled shift. Healthcare providers also should actively open lines of communication with employees about meal break policies, including the importance of taking full meal breaks, the means by which interrupted or missed breaks must be reported so that they can be compensated, and the critical responsibility employees have for following complaint procedures to bring any perceived problems promptly to the attention of the employer. Regular training of employees and managers on topics such as certification of time worked and receipt of meal breaks, accurate time recording, exception reporting, and deduction overrides are another important element of any compliance program.

Finally, long-term care providers should stay on top of the continually evolving regulatory environment and make sure that they have appropriate compliance mechanisms in place to manage changes to the existing rules.

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