

INTRODUCTION TO **THE LITTLER REPORT**

WAGE AND HOUR CLASS ACTIONS IN THE HEALTHCARE INDUSTRY:

Diagnosis and Prevention

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WAGE AND HOUR CLASS ACTIONS IN THE HEALTHCARE INDUSTRY: Diagnosis and Prevention

I. THE SCOPE OF THE PROBLEM

With the wave of antitrust class actions against hospitals abating, plaintiffs' attorneys are brandishing a new and potent weapon: wage and hour class and collective actions.¹ Littler's own internal study of wage and hour class action filings in state and federal courts from January 1, 2008 found that the number of wage and hour class actions filed against healthcare providers, including hospitals, nursing homes, and other healthcare related entities, spiked more than two-fold from January through May 2009 as compared to the same period in 2008.² In the last two months alone, aggressive plaintiffs' class action law firms filed suit against three large hospital systems in Pennsylvania on behalf of classes expected to include, respectively, 40,000, 12,000 and 4,000 employees, and against a hospice care provider in Florida, which operates 46 hospice programs in 16 states.

Plaintiffs' class action counsel no longer wait for potential wage and hour plaintiffs to walk through the door or call. Instead, counsel are contacting employees directly regarding potential litigation. Many healthcare employees throughout the Northeast already have received a letter sent by a prominent New York plaintiffs' class action firm to hospital employees across the country. The letter states:

Our investigation has revealed that many hourly employees in the health care industry are not paid for all the hours that they work, especially during meal periods. You may be owed unpaid wages for situations including when you worked during your meal break. We are currently investigating.

Enclosed with the letter is a "fact sheet" which poses the question: "Is there any urgency to complete the consent form?" The lawyers' response: "Yes... any delay in returning the Consent Form can cost you back wages."

Plaintiffs' class counsel are turning to increasingly sophisticated means to identify and gather "opt-in" plaintiffs. In just the last six months alone the "investigations" referenced in the lawyer's letter have produced several law suits, which have all been conditionally certified as collective actions, against health systems in New York and Pennsylvania, including, *Fengler v. Crouse Health Foundation, Inc.*;³ *Colozzi v. St. Joseph Hospital Health Center*;⁴ *Hamelin v. Faxton-St. Luke's Healthcare*;⁵ *Camesi v. University of Pittsburgh Medical Center*;⁶ *Kuznyetsov v. West Penn Allegheny Health System*;⁷ and *Taylor v. Pittsburgh Mercy Health System*.⁸ In each case, the court conditionally certified classes comprised of all nonexempt employees who were subject to the same policy — automatic 30-minute pay deductions for meal periods — not just those in specific departments or particular job titles. The potential size of the class of nonexempt employees at the University of Pittsburgh Medical Center alone is 30,000.⁹

While some attribute the spike in the number of wage and hour class actions in the healthcare industry to the media attention given to large settlements and judgments, the aggressive tactics of plaintiffs' attorneys cannot be ignored. The internet allows plaintiffs' attorneys to more efficiently and expeditiously amass information regarding an employer's practices, and reach employees across the country, in some cases using information gathered from union and state registries. Plaintiffs' attorneys also have set up websites to provide information to employees about current "investigations" of healthcare employers. One such website is www.hospitalvertime.com and another is www.overtimecases.com. Both websites direct the viewer to identified plaintiffs' law firms and further identify that firm's pending "investigations."

The internet also provides nearly instantaneous information about significant settlements (or, more rarely, judgments) in wage and hour class actions regardless of location. Moreover, the pleadings filed by successful plaintiffs' counsel, also typically available online, provide a template for ambitious lawyers nationwide. As a result, because of the sheer size of these cases, the disruption they cause, the large potential damages, the potential for adverse publicity, and the cost of litigation, many companies and institutions feel compelled to pay significant amounts to settle these lawsuits. Such settlements beget further litigation, including repeat claims by the same lawyers against the same institutions, as the eyes of plaintiffs' counsel keenly focus on each "pay out," particularly the significant wage and hour settlements seen for many years in California.

There have been a number of recent multi-million dollar wage and hour class action judgments and settlements involving well known and highly respected healthcare employers, some exceeding \$50 million, and each involving significant fees to plaintiffs' counsel. Examples of some recently publicized settlements include:

- A class action against a large healthcare plan by support specialists, product specialists, and business application coordinators who worked in an IT capacity and claimed they were misclassified as exempt. The plaintiffs alleged they were denied overtime under the California Labor Code and the FLSA for hours in excess of 40 and that they were not paid for travel time and meal breaks. In October of last year, the employer agreed to pay \$5.4 million to settle the case.
- A class action against a large hospital by current and former nurses, social workers and aides who claimed they were denied overtime and rest and meal periods in violation of the California Labor Code. The Court approved a settlement of \$15 million.
- A class action by 3,000 home healthcare workers who claimed they were not paid for time spent (or expenses) when traveling between patient visits and — as a result — were denied overtime. The employer agreed to pay \$2 million dollars and to prospectively pay for travel time and to include those hours on the road to calculate overtime.
- A settlement of over \$9 million by a large hospital and healthcare system to a class of nurses and other employees who claimed they worked during uncompensated rest breaks that were automatically deducted from their time cards and paychecks.

The explosion of wage and hour class actions, while visited upon employers in all sectors of the economy, is now focused on healthcare industry employers in part because it remains one segment of the economy that continues to grow. The recent class action lawsuits (and settlements) have predominately involved three distinct areas of wage and hour law: (1) “off-the-clock claims;” (2) employee misclassification; (3) the “regular rate of pay” and shift differentials. This Littler Report examines the legal theories and practical implications of lawsuits brought in these three areas and suggests practical solutions to defend against and perhaps avoid such claims.

**If you would like to receive the entire Littler Report entitled
“Wage And Hour Class Actions in the Healthcare Industry: Diagnosis And Prevention” please contact:**

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1 Collective actions provide a powerful tool for unions seeking to organize healthcare employers as well. The ability to directly contact a large class of nonexempt employees provides a union access to employees which it likely would not have otherwise. And, to publicly assert claims of unlawful compensation practices provides unprecedented positive press for an organizing effort. The Service Employees International Union (SEIU) has provided legal counsel and heralded its victories in FLSA collective actions against non healthcare employers. *See e.g.* <http://www.seiu.org/2007/09/janitors-win-more-than-1-million-in-lost-pay-from-ups-and-cleaning-contractors.php>. As SEIU and other unions intensify their organizing efforts in the healthcare industry, employers can reasonably expect that union trial lawyers will be setting their sights on healthcare systems nationwide.

2 This is not all that surprising considering the recent dramatic increase in employment class actions in general, and FLSA collective actions in particular. From 2004 to 2008, there was a 99% increase in employment class action filings in federal courts. Of those, the largest and most dramatic percentage increase was in class actions filed under the FLSA, which increased 98% between 2004 and 2007. EL 360, January 15, 2009 <http://www.law360.com/articles/76803>.

3 595 F. Supp. 2d 189 (N.D.N.Y. 2009).

4 595 F. Supp. 2d 200 (N.D. N.Y. 2009).

5 2009 U.S. Dist. LEXIS 9793 (N.D.N.Y. Jan. 26, 2009).

6 2009 U.S. Dist. LEXIS 40571 (W.D. Pa. May 14, 2009).

7 2009 U.S. Dist. LEXIS 47163 (W.D. Pa. June 1, 2009).

8 2009 U.S. Dist. LEXIS 57328 (W.D. Pa. July 7, 2009).

9 *Camesi*, 2009 U.S. Dist. LEXIS 40571, at*3.

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