

IN THE KNOW

July 2010

RASH OF WAGE AND HOUR ATTACKS ON HEALTHCARE PROVIDERS

By Donald W. Benson and Nichole Hair

An itching, irritating and dangerous rash of wage and hour lawsuits is spreading across the U.S. toward health care providers.

Meal breaks of more than 30 minutes are not required to be treated as paid work time under the federal Fair Labor Standards Act ("FLSA"). In the first outbreak of almost 300 lawsuits in late 2009 thru early 2010, many of the accusations focused on time keeping systems which automatically deducted pre-set 30 minute breaks for all employees for scheduled meal periods. Although the employees were able to manually over-ride the time keeping systems when the meal break was interrupted and they in fact performed work for part of the 30 minute breaks, the plaintiff employees alleged that they were discouraged from making such corrections. These factual disputes exposed employers to sizable class actions alleging that employees were entitled to be paid for the entire 30 minute meal period.

Two newly filed cases are examples of how plaintiffs' counsel across the country are trying to expand their over-time claims beyond time keeping errors for meal breaks to additional areas of wage and hour liability against hospitals, nursing facilities and other healthcare providers: (1) completing paperwork at home and (2) pre- and post-shift work.

I. WORKING OFF THE CLOCK: HOSPITAL SERVICE COORDINATORS

In a recent case filed in federal court in the Western District of Pennsylvania on behalf of hospital service coordinators, *Richardson v. UPMC Health System*,¹ the plaintiffs allege that they performed unpaid work at home.

The *Richardson* plaintiffs made the now common claim that potential class members are subject to an automatic deduction of 30 minutes for meal breaks, even when they work through part or all of the break. The *Richardson* plaintiffs, however, go beyond this standard allegation to complain that the hospital's service coordinators also regularly perform work at home, including preparing progress notes and other paperwork, for which they are not paid:

The failure to pay for the overtime hours worked by Plaintiff and the other service coordinators is a result of several policies and practices: (a) automatic deduction of a 30-minute lunch despite the fact that Plaintiff and the other service coordinators regularly worked all or part of the lunch break; (b) work at home to prepare progress notes and other paperwork necessary for the completion of the essential duties of the job, work that was done with the knowledge of management but not compensated; and, (c) a policy by management of not paying overtime for paperwork done outside the core hours whether that work was done at the job site or at home.

Even though this is not at first blush a particularly large class action in terms of the number of potential plaintiffs or relevant time period, the Plaintiffs can be expected to try to extend the class to other facilities. The Plaintiff worked at UPMC Western Psychiatric Institute and Clinic (WPIC) - Neighborhood Living located in Pittsburgh, PA. The UPMC Health System is alleged to have been an integrated healthcare network of hospitals, research and treatment centers. Plaintiff was employed by Defendant UPMC Health System ("UPMC") from July 21, 2009, until April 23, 2010. Plaintiff alleges that there were 17 service coordinators at her facility and that 27 service coordinators had worked at their facility over the three year applicable statute of limitations under the FLSA. At an hourly wage of \$13.23, if each potential class member worked through several meal breaks each week and worked from home even an additional hour each day, the potential class claims could be substantial. If the plaintiffs can extend their class to other facilities, the potential liability is further increased.

There is a long history of FLSA class actions involving claims for unpaid work time performed away from the employer's premises. Employers have a particularly tough time defending such claims where the work is regularly performed, there is not enough time during the regular shift to expect the paperwork to be completed, and the employer has access to computer, phone or text records which would show that the work was being performed outside of normal work hours and away from the employer's premises.

Such "work from home" claims are a relatively new but certainly troublesome part of wage and hour claims being brought against healthcare systems.

ABOUT HBSS

Hall Booth Smith & Slover is a full-service law firm with eight regional offices in Georgia, Tennessee and South Carolina. The firm's varied practice areas include Employment, Healthcare, Long Term Care and Senior Housing, Outside General Counsel-Healthcare, Professional Negligence/Medical Malpractice, Immigration, and Workers' Compensation.

Whether it's a matter of litigation taking place in the courtroom or negotiations happening in the board room, the attorneys at HBSS will aggressively represent your interests every step of the way.

For more than twenty years, HBSS has been living up to its promise: "Serving to Achieve Excellence." This promise is alive in everything we do from strategically recruiting nationally recognized attorneys and top law students, to being among Atlanta Magazine's "Best Places to Work."

HBSS publications are intended to inform clients and other interested parties about legal matters of current interest and is not intended as legal advice.

© 2010 Hall Booth Smith & Slover, P.C.

II. UNPAID WORK BEFORE AND AFTER SHIFTS: CERTIFIED REGISTERED NURSE ANESTHETISTS

In yet another recent class action filed against a large hospital system, an employee terminated for falsification of time records turns around to claim unpaid work time before and after her shifts.

In *Deppen v. Detroit Medical Center*,ⁱⁱ a nurse who was fired for theft of time by falsifying her time records, brought a suit alleging that the hospital systematically failed to pay RNs for off-the-clock work in violation of the FLSA and Michigan wages laws. In her complaint, the nurse alleges that she and all similarly situated nurses were required to work prior to and after their scheduled shifts, and that no appropriate time keeping methods were implemented to provide the required overtime pay.

The Detroit Medical Center is a Michigan non-profit corporation which operates surgery centers and related ventures located in southeast Michigan. The Plaintiff was hired in November 1993, when she began working at Hutzel Hospital as a Certified Registered Nurse Anesthetist (“CRNA”).

According to the Plaintiff, the sole basis for her termination was parking garage records (“Records”) allegedly indicating when Plaintiff swiped her employee badge to enter and exit the parking garage. The Records demonstrate that during a two month period, Plaintiff entered the parking garage after her shift had begun or left the parking garage before her shift had ended, but Plaintiff did not amend her weekly time sheets to reflect these late arrivals and early departures.

Plaintiff contends that she, like all similarly situated CRNAs working at Hutzel Hospital and/or the DMC, completed her weekly time sheets to reflect the hours she was scheduled to work, regardless of whether she was relieved from her shift early or was forced to work beyond the end of her shift.

According to the Plaintiff, no system was implemented by Defendant to accurately track the actual hours worked by Plaintiff or the other CRNAs. Defendant systematically required CRNAs to work beyond their scheduled hours and knew that the weekly time reports were inaccurate.

According to the Plaintiff, this system of weekly time keeping, resulted in the hospital systematically underpaying CRNAs for actual hours worked, knowing that the weekly records of scheduled time did not accurately reflect actual hours worked.

III. WAGE AND HOUR SELF-REVIEW: THE RASH VACCINE

Prudent healthcare providers will recognize that they are attractive, trendy targets of wage and hour class actions. Potential recoveries are big because healthcare workers are relatively highly paid in many instances and often work long hours. If a record keeping system is inaccurate due to automatic deductions or rounding, if it fails to reflect work performed away from the employer’s premises, or if it fails to reflect actual hours worked, the unpaid overtime is often at a high hourly rate and the number of hours at issue can be large.

Many healthcare providers are trying to inoculate themselves before a rash develops by preventative self-audits of their wage and hour practices and record keeping systems. Although every facility’s practices will require slightly different elements, most self-audits of wage and hour practices find it useful to include:

- Reviewing how the automated and non-automated time record keeping systems actually work;
- Determining if work is actually performed pre- and post-shift;
- Identifying when work is assigned and expected to be completed;
- Determining when and where actual work is performed;
- Examining work that might be performed away from the employer’s premises;
- Reviewing instructions to employees about accurately recording actual time worked;
- Reviewing instructions to supervisors about recording subordinates’ time;
- Determining who has authority and the processes for changing time submitted by employees, including: employee punches wrong time card or inputs wrong employee number; incorrectly records amount of hours worked; or records incorrect shift or date; forgets to clock in or out at beginning or end of shift; or fails to clock in or out at meal breaks;
- Interviewing supervisors about employee questions regarding recording time and overtime;
- Exploring how to effectively implement procedures where workers must certify the accuracy of time reports as they input their time;
- Identifying departments or facilities whose workloads have changed and examining any corresponding increases or decreases to worked time, overtime, or unanticipated anomalies in reported time;
- Consideration of alternative strategies for controlling overtime hours actually worked.

ⁱ *Richardson v. UPMC Health System*, Civ. No. 2:10-cv-00699-WLS (U.S.D.C. W.D. PA. 05/20/10).

ⁱⁱ *Deppen v. The Detroit Medical Center*, Civ. No. 2:10-cv-1229-GCS-MAR (U.S.D.C. E.D. MI. 06/07/10).



DON BENSON

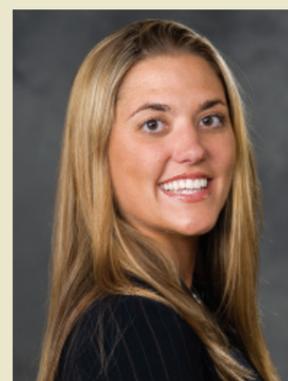
is a senior litigator in labor and employment law representing management clients in the avoidance, resolution and litigation of employment disputes. Don is a frequent speaker and author on wage and hour topics and employment liability for the healthcare sector.

Don Benson

P: 404.954.6947

F: 404.954.5020

dbenson@hbss.net



NICHOLE HAIR

brings experience representing public and private employers in harassment and discrimination claims involving Title VII, FLSA, FMLA, ADEA, and ADA. She provides both litigation expertise and experience in litigation prevention through on-site investigation, discrimination, and harassment training for managers and employees. She is licensed in Georgia and is an active member of the Georgia Association of Women Lawyers.

Nichole Hair

P: 404.954.6952

F: 404.954.5020

nhair@hbss.net

HBSS publications are intended to inform clients and other interested parties about legal matters of current interest and is not intended as legal advice.