

HOT FLSA ISSUES IN THE HEALTHCARE FIELD

**WI State Bar Health Law and Labor & Employment
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INTRODUCTION

- Wage and hour claims have been steadily on the rise in all areas in recent years, and the trend has recently extended to the healthcare industry as well. This presentation will focus on two areas which have been particularly active recently:
 - Cases involving the alleged misclassification of pharmaceutical sales representatives as overtime exempt; and
 - Cases alleging improper meal break deductions for hospital employees.

INTRODUCTION

- Additionally, the presenters will provide an overview of the class and collective action mechanisms common in these cases and provide some suggestions on best practices to ensure compliance.

WHY SHOULD YOU CARE ABOUT WAGE & HOUR COMPLIANCE?

- The Administrative Office of U.S. Courts reports the number of FLSA-related cases filed in federal district courts rose from 1,257 in 1990 to 6,335 in 2011
- In fiscal year 2008 – WHD recovered more than \$185 million in back wages leading to a 8-year cumulative total at over \$1.4 billion
- In 2009, the value of the top 10 private wage-and-hour settlements totaled nearly \$363.6 million
- DOL hired an additional 250 investigators in 2009.

FOCUS ON HEALTHCARE INSTITUTIONS

- DOL recovered more than \$1.7 million in back wages for 4,000 employees of a St. Louis healthcare system
- DOL recovered more than \$2.7 million in back pay wages for 700 employees of a local Boston healthcare system
- California settlement involving a national healthcare corporation that agreed to pay \$85 million in overtime pay for nurses and other staff

INTERNET PROVIDES EMPLOYEES INFORMATION

- DOL's "app" to help employees track the hours they work and determine the wages they are owed
- Hospital OT – <http://www.hospitalovertime.com>
- Hawks Quindel Wage and Hour Blog
<http://www.hq-law.com/blog/>
- Top Class Actions –
<http://www.topclassactions.com>
- Overtime Law Blog – <http://flsaovertimelaw.com>

DO NOT IGNORE THE WARNING

- Financial risk
- Multiplier effect
- Statute of limitations – willful/non-willful
- “Good faith” defense and liquidated damages
- Reputational risk – employees, general public and benefactors

CLASS AND COLLECTIVE ACTIONS – A PRIMER

- Class vs. Collective Actions
- Opt-In vs. Opt-Out
- Statute of Limitations
- Certification Standards
- Hybrid Actions

AUTOMATIC MEAL BREAK DEDUCTION CASES

- “Off-the-Clock” Allegations
 - Generally relate to pre- and post-shift activities
 - In health care settings, these claims generally occur because staff take their jobs very seriously and the consequence of not performing work is usually diminished patient care
 - Employers must be vigilant to ensure that staff are paid for all hours worked and that during unpaid breaks, their employees are completely relieved of their work duties (or paid for the break).

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Defining Compensable Working Time
 - FLSA does not define “hours worked”
 - “Employ” under FLSA – “to suffer or permit to work”
 - US Supreme Court defined “hours worked” – all time spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer”
 - Subsequent US Supreme Court decision clarified “workweek” – “all time during which an employee is on the employer’s premises, on duty or at a prescribed work place”

AUTOMATIC MEAL BREAK DEDUCTION CASES

- FLSA – *bona fide* meal periods
 - At least 30 minutes
 - Employee must be completely relieved from duty during that time
 - Any duties performed – whether active or inactive – disqualifies the time from being unpaid
 - Issues of carrying pagers and Vocera devices

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Most courts will now assess whether – on balance – employees use mealtime for their own or their employer’s benefit
 - Question is the extent of the interruptions and whether the interruptions cause the employee to spend his/her time primarily for the employer’s benefit

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Questions -
 - Thinking about nursing staff or security personnel – when are they truly relieved of all work duties during meals?
 - Why set policies that put the onus on the employee to “cancel” meal breaks in which they were interrupted?

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Wisconsin Law – employees must be compensated for all “on duty” meal periods
 - One where the employer does not provide at least 30 minutes free from work
 - Employee must be free to leave the premises of the employer

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Wisconsin Administrative Code interprets work as hours spent in “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer’s business”
 - Not required to be paid for bona fide meal periods of 30 minutes or more and duty free
 - Not relieved if they are required to perform any duties – whether active or inactive – while eating
 - If required to spend his or her lunch hour on the employer’s premises – whether active or inactive – that time is compensable

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Questions –
 - What if there is no policy explicitly preventing staff from leaving the facility, but they must be ready and available to respond to emergency situations?
 - What if the size of the facility makes it impracticable to leave the facility?

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #1 – Automatic Meal Deductions.
 - *Kuznyetsov v. West Penn Allegheny Health System, Inc.*
 - Significant dissimilarities among the plaintiffs (wide range of jobs)
 - Application of 30-minute meal break was not standardized, weighing heavily against class certification
 - Defenses available to defendant were inherently individualized
 - Cancellation of automatic deductions were decentralized and contrary to FLSA's collective purpose

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #2 – Automatic Meal Deductions.
 - *Camesi v. University of Pittsburgh Medical Center*
 - Involved 500 different job titles working in over 1,000 different hospital departments
 - Class alleged FLSA violations for failure to consistently provide meal breaks
 - After conditional certification, discovery noted:
 - Plaintiff received training regarding UPMC's meal break cancellation policies
 - She was paid for working through meal breaks at least five times

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #2 – Automatic Meal Deductions.
 - *Camesi v. University of Pittsburgh Medical Center.*
 - Regarding other named plaintiff's evidence:
 - She “rarely” missed a full meal break
 - She was never told by management not to cancel meal breaks
 - She was paid for working through a meal break at least once
 - She admitted that her supervisors would have had no way of knowing whether she worked through an unpaid meal break

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #2 – Automatic Meal Deductions.
 - *Camesi v. University of Pittsburgh Medical Center.*
 - “To bind together otherwise differently situated employees, an alleged common policy must potentially violate the FLSA”
 - “Standing alone, an employer policy providing automatic deductions for meal breaks does not violate the FLSA”

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #3 – On-Call Statute During Lunch Breaks.
 - *Blaney v. Charlotte-Mecklenburg Hosp. Auth.*
 - “Where the record before the court demonstrates that there is no common policy or scheme and instead individualized questions of fact predominate, the action is not an appropriate one for certification”

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #4 – Lunch Breaks, Pre-and Post-Shift Work, Time Spent Attending Training Sessions.
 - *Manning v. Boston Medical Center Corp.*
 - Three prospective groups of plaintiffs
 - 4,000+ plaintiffs
 - Pre-/post-shift and training issues → Court concluded the job functions and daily tasks had little to nothing in common
 - Meal Breaks Deductions → does not necessarily constitute a unified policy of FLSA violations capable of binding together a collective action
 - The proposed class spanned the health care occupational gamut

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #5 – On Call Lunch Breaks for Security Officers
 - *Brabazon v. Aurora Healthcare.*
 - Conditional certification for a class of security officers working at Aurora Healthcare facilities who were subject to an automatic meal break deduction policy
 - Meal breaks were automatically deducted from employee's pay unless they actively "canceled" their meal period in the Kronos time clock

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #5 – On Call Lunch Breaks for Security Officers
 - *Brabazon v. Aurora Healthcare.*
 - Court found Plaintiff and class members to be similarly situated
 - Court rejected Aurora's argument that certification was not warranted because an automatic deduction policy does not, on its face, violate the FLSA

AUTOMATIC MEAL BREAK DEDUCTION CASES

- Case #5 – On Call Lunch Breaks for Security Officers
 - *Brabazon v. Aurora Healthcare*.
 - Court found that:
 - Putative class members could not leave the premises during unpaid meal periods; and
 - They had to remain available to respond to emergencies during meal periods “on its own”

PHARMACEUTICAL SALES REPS MISCLASSIFICATION CASES

- Employee Misclassification Claims – classifying “non-exempt” employee as “exempt” from the FLSA overtime pay requirements
 - Job Titles Do Not Matter – Focus on:
 - Job duties
 - Manner in which the employee is paid

PHARMACEUTICAL SALES REPS MISCLASSIFICATION CASES

- Issue of Pharmaceutical Sales Representatives
 - Industry has long considered its sales reps to be exempt from the FLSA's overtime requirements
 - Recent years, a significant number of class actions challenging the industry's classification

PHARMACEUTICAL SALES REPS MISCLASSIFICATION CASES

- Issue of Pharmaceutical Sales Representatives
 - US Supreme Court decision in *Christopher v. SmithKline Beecham Corp* (June 18, 2012)
 - Court held that the pharmaceutical sales representative's primary duty was indeed sales
 - Court described the sales rep's primary duty as "to obtain nonbinding commitments from physicians to prescribe their employer's prescription drugs in appropriate cases"
 - Rejected DOL's narrow definition of a "sale" as the transfer of title

PHARMACEUTICAL SALES REPS MISCLASSIFICATION CASES

- Issue of Pharmaceutical Sales Representatives
 - 7th Circuit Court of Appeals decision in *Schaefer-LaRose v. Eli Lilly & Co* and *Jirak v. Abbott Laboratories, Inc* (May 18, 2012)
 - Pharmaceutical sales reps are exempt under the FLSA's administrative exemption.
 - Court held that representatives were “the public face of their employer to their most important decision-maker regarding the use of their companies' products, the prescribing physicians”

PHARMACEUTICAL SALES REPS MISCLASSIFICATION CASES

- Issue of Pharmaceutical Sales Representatives
 - However, DOL regulation interpreting the administrative exemption states that sales work is not exempt administrative work. See 29 C.F.R. 541.205

PROACTIVE STEPS AND A GOING-FORWARD LOOK

- Conduct regular audits of job classifications
- Conduct regular payroll audits
- Review written policies, document dissemination, train your staff
- Develop a “best practices” meal breaks policy
- Assess practical impact of correction
- Assess financial impact of correction
- Assess strategy for minimizing exposure

PROACTIVE STEPS AND A GOING-FORWARD LOOK

- Document so as to be able to provide evidence that the employer engaged in “significant efforts” to advise employees and managers of relevant policies – this proved to be a factor in the defendants’ favor in *Camesi*
- Educate your staff and monitor compliance – again, this was a factor in the *Camesi* decertification

PROACTIVE STEPS AND A GOING-FORWARD LOOK

- Take responsibility – it is up to the employer to make sure that it pays for all hours worked
- If you want unpaid breaks, ensure that they are duty free and employees are able to leave the facility

- Questions

